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of all Forms of
Racial Discrimination

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

## REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION

**Third periodic reports of States parties due in 1999**

**Addendum**

## SWITZERLAND*

[14 November 2000]

* This document contains the second and third periodic reports of Switzerland, which were due on 29 December 1997 and 29 December 1999 respectively. For the initial report of Switzerland and the summary records of the meetings at which the Committee considered that report, see CERD/C/270/Add.1 and CERD/C/SR.1248, 1249 and 1268.

The annexes provided by Switzerland may be consulted in the secretariat.

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## Introduction

1. Switzerland acceded to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "the Convention") on 29 November 1994.[1] The Convention entered into force for Switzerland on 29 December 1994.[2] Under article 9 of the Convention, the States parties undertake to submit periodic reports on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention.

2. This report was prepared in accordance with the general guidelines regarding the form and contents of reports to be submitted by States parties under article 9 (1) of the Convention, adopted by the Committee on the Elimination of Racial Discrimination (hereafter "the Committee").[3] It contains an account of the measures that Switzerland has adopted to implement the Convention since the presentation of the initial report by the Swiss delegation to the Committee on 3 and 4 March 1998.

3. This report is intended to complete and update the initial report, submitted on 18 December 1996.[4] In considering the remarks that follow, account should be taken of:

(a) The introductory statement made during the oral presentation of the initial report;

(b) The oral replies by the Swiss delegation to the questions asked by the Committee during the presentation of the initial report (see summary records of 1248th and 1249th meetings of the Committee (CERD/C/SR.1248 and 1249));

4. For the sake of clarity, this report (with its annexes) is divided into three parts:

(a) Part One, entitled "General information", contains a number of observations on changes in the population structure of Switzerland and provides information on the development of Swiss law and policy in the fields covered by the Convention since the submission of the initial report to the Committee;

(b) Part Two examines these changes and developments in the light of the relevant provisions of the Convention. In other words, it consists of an updated commentary on articles 2 to 7 of the Convention;

(c) Finally, Part Three refers to the concluding observations, dated 30 March 1998, that the Committee made following its consideration of Switzerland's initial report (hereafter "the concluding observations" (CERD/C/304/Add.44)) and sets out the Swiss views on the points that had caused the Committee concern.

5. Switzerland's second report was initially scheduled for submission on 31 December 1997. However, as it was not possible for the initial report to be presented to the Committee until March 1998 and as the Committee, moreover, did not make known its concluding observations on that report until after that date, the decision was taken to postpone the presentation of the second report. Subsequently, however, the date for the submission of the third report fell due on 31 December 1999. For this reason, the second and third reports have

been combined in a single document, which has resulted in an increase in its size. It was also important, in this report, to take account of the complete revision of the Federal Constitution adopted since the initial report was issued (new Federal Constitution of 18 April 1999, which came into force on 1 January 2000); this made it necessary to redraft a comprehensive and detailed account of the Swiss basic charter, even though it had been covered at some length in the initial report.

6. The report was drawn up by the Directorate for Public International Law, in collaboration with the Federal Offices for justice, foreigners, refugees, cultural affairs and statistics. The Federal Commission against Racism, the Federal Commission on Foreigners and the Federal Commission for Refugees, as well as many bodies independent of the federal administration, were also consulted.

## PART ONE: GENERAL INFORMATION

### I. PRELIMINARY NOTE

7. Part One contains a brief account of changes in the resident population in Switzerland since the submission of the initial report.[6] It also provides general information on the development of internal law since then and gives an overview of the current policy of the Swiss authorities aimed at eliminating all forms of racial discrimination. This information is supplemented and developed in the commentaries relating to articles 2 to 7 of the Convention, which constitute Part Two of the report.

### II. CHANGES IN THE POPULATION STRUCTURE

#### A. General information and statistical methods

8. As regards the collection of relevant data and the statistical bases relating to population in Switzerland, reference should be made to paragraphs 5 et seq. of the initial report submitted by Switzerland. The next census will take place on 5 December 2000 and will combine information gathered by means of a questionnaire and data deriving essentially from the official registers (register of inhabitants, register of buildings and housing), under the system planned for the 2010 census. This new information-gathering method was introduced as a result of the adoption of the Federal Act concerning the Federal Population Census,[7] of 26 June 1998, and the revision of the Federal Statistics Act in June 1998.[7]

#### B. Statistical information

9. At the time when the initial report was submitted, the population of Switzerland stood at 7,080,948, 19.6 per cent of whom were foreigners.[8] Switzerland was already then one of the European countries with the highest recorded proportion of foreigners among its residential population.[9] In 1998, the resident foreign population increased by 18,400 (+1.2 per cent) in relation to the previous year, bringing the total to 1,502,000. The main factors responsible for this growth were the increase in the number of asylum-seekers (+12,700), the excess resulting from the number of births (+16,400) and finally a slight increase in the quota of workers authorized for the first time to enter Switzerland and stay for over a year (+1,200). At the

end of 1998, 93,800 people (6.2 per cent) came into the category of asylum-seekers, while 142,369 foreigners were pursuing a gainful occupation in Switzerland but living outside its borders. The number of foreigners as a proportion of the total resident population as a whole amounted to 20.7 per cent[10] in 1998. Excluding persons holding short-term residence permits, the seasonal workforce and asylum-seekers, the proportion falls to 19.1 per cent.[11]

**1. Permanently resident foreign population by country of origin (1995-1999)**

| Country of origin | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| Italy | 361 892 | 352 669 | 344 591 | 336 850 | 329 773 |
| Former Yugoslavia | 296 118 | 307 514 | 316 607 | 324 981 | 337 080 |
| Portugal | 135 646 | 137 848 | 137 148 | 136 581 | 135 727 |
| Spain | 102 320 | 98 516 | 94 898 | 91 302 | 87 624 |
| Germany | 91 976 | 93 686 | 95 737 | 98 934 | 103 701 |
| Turkey | 79 372 | 80 177 | 80 333 | 80 286 | 80 630 |
| France | 55 407 | 55 974 | 56 750 | 57 881 | 59 879 |
| Austria | 28 454 | 28 385 | 28 297 | 28 290 | 28 473 |
| United Kingdom | 20 030 | 19 755 | 19 814 | 20 222 | 21 216 |
| Netherlands | 13 992 | 14 234 | 14 204 | 14 026 | 14 245 |
| United States of America | 12 770 | 12 845 | 12 969 | 13 235 | 13 719 |

**2. Distribution by continent**

| Continent | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| Europe, including: | 1 258 937 | 1 240 865 | 1 240 744 | 1 242 647 | 1 254 001 |
| European Union and EFTA countries | 839 184 | 830 345 | 820 454 | 813 710 | 810 512 |
| Africa | 28 800 | 29 911 | 31 349 | 32 993 | 35 446 |
| America | 38 585 | 40 361 | 42 285 | 44 043 | 46 955 |
| Asia | 54 914 | 56 804 | 58 366 | 63 496 | 67 366 |
| Australia, Oceania | 1 999 | 2 023 | 2 096 | 2 248 | 2 569 |
| No nationality, State unknown | 355 | 330 | 322 | 268 | 274 |
| Total | 1 363 590 | 1 369 494 | 1 375 158 | 1 383 645 | 1 406 630 |

Source: Federal Office for Statistics (OFS), Annuaire statistique de la Suisse 2000, table T.1.29.

10. In 1998 - for the first time in six years - the number of long-term immigrants once more showed a slight increase (+3.7 per cent), rising to 72,200. To this figure should be added 88,800 seasonal workers or persons holding a short-term residence permit, who had lived for less than a year in Switzerland, as well as 40,900 asylum-seekers.[12] However, the number of immigrants returning to their countries of origin has become quite considerable: in 1998, 887 such departures were recorded for every 1,000 immigrants arriving. The overwhelming majority of those returning to their country left Switzerland after a relatively brief stay (46 per cent of returnees in 1998 had remained less than five years in Switzerland). In 1999, the breakdown of the total new immigrant population was as follows: 34,931 (37.1 per cent) entered for the purpose of family reunification; 15,174 (16.1 per cent) were admitted under the cantonal or

federal quotas;[13] 6,374 (6.8 per cent) had their seasonal permits converted to annual residence permits; 10,000 (10.6 per cent) were schoolchildren or students; 1,787 (1.9 per cent) obtained residence permits on humanitarian grounds; and the remaining 26,002 (27.5 per cent) consisted of Swiss returning to the country, children placed with a view to adoption, recognized refugees, retired persons and people of independent means, and persons of foreign nationality who had married Swiss nationals.

11. The shift towards nationals of distant or fairly distant countries has continued. Since 1998, the proportion of nationals from non-European States has risen from 6 per cent to 12 per cent. In 1998, the number of persons returning to Italy, Spain and Portugal, the countries that traditionally supplied the bulk of the foreign workforce in Switzerland, exceeded by 11,900 that of new immigrants coming from these countries. Nevertheless, the majority (56 per cent) of foreigners residing in Switzerland come from a State member of the European Union or the European Free Trade Association (EFTA). From this standpoint, Switzerland differs from most Western European States, where immigrants from Eastern Europe, Turkey or non-European States predominate.

### 3. Immigration by country of origin

| Country of origin | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| Former Yugoslavia | 22 377 | 14 512 | 10 920 | 9 906 | 11 894 |
| Portugal | 9 651 | 6 670 | 4 999 | 4 680 | 4 464 |
| Germany | 8 501 | 8 362 | 8 178 | 8 955 | 10 628 |
| Italy | 6 259 | 4 465 | 4 314 | 4 366 | 5 197 |
| France | 5 101 | 4 916 | 4 880 | 5 318 | 6 144 |
| Turkey | 3 247 | 2 839 | 2 401 | 2 202 | 2 616 |
| Spain | 2 567 | 1 802 | 1 518 | 1 435 | 1 392 |
| United Kingdom | 2 738 | 2 436 | 2 522 | 2 731 | 3 351 |
| United States of America | 3 036 | 2 954 | 2 868 | 2 945 | 3 326 |
| Austria | 1 355 | 1 289 | 1 228 | 1 204 | 1 341 |
| Netherlands | 1 524 | 1 363 | 1 093 | 954 | 1 122 |
| Total Europe | 70 727 | 55 322 | 48 829 | 49 089 | 56 484 |

| Continent | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| Africa | 3 884 | 3 604 | 3 904 | 4 436 | 4 993 |
| Asia | 7 665 | 7 134 | 8 353 | 9 817 | 12 068 |
| Americas | 8 148 | 7 812 | 7 929 | 8 202 | 9 290 |
| Australia, Oceania | 512 | 478 | 563 | 636 | 826 |
| No nationality, State unknown | 21 | 9 | 26 | 22 | 16 |
| Total | 90 957 | 74 359 | 69 604 | 72 202 | 83 677 |

Source: OFS, Annuaire de la statistique suisse 2000, table T.1.22.

## III. CHANGES IN LINGUISTIC, CULTURAL AND RELIGIOUS MINORITIES

### A. General information

12. The title of the Convention makes it clear that it places States parties under the obligation to eliminate all forms of racial discrimination.[14] Since the submission of the initial report, Switzerland has ratified other international instruments, in particular the Council of Europe's Framework Convention for the Protection of National Minorities.[15] Furthermore, it continuously examines the case for signing or ratifying other conventions designed to ensure observance of the rights of the minorities concerned through individual appeal procedures. However, it should be noted that the notion of "minorities", employed at the beginning of the initial report, should in no way be interpreted restrictively and that the small number of particularly exposed groups to which reference was made are no more than examples.

13. There is no legally binding international instrument that defines the concept of a "minority" or "national minority". Concerning the scope of application of the Council of Europe's Framework Convention, the Federal Council made the following declaration when ratifying this Convention.[16]

> "In Switzerland national minorities in the sense of the Framework Convention are groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, firm and lasting ties with Switzerland, and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language."

14. This declaration by the Federal Council draws on the definition of the concept of "national minority" contained in article 1 of the draft text (dated 1 February 1993) of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR), emanating from the Parliamentary Assembly of the Council of Europe.[17] It is similarly based on article 2 (1) of the draft European Convention for the Protection of Minorities, of 4 March 1991, which was adopted by the European Commission for Democracy through Law (Venice Commission). It follows from this definition that in Switzerland the Framework Convention can apply not only to national linguistic minorities, but also to other groups within the population, such as the Jewish community or travellers. On the other hand, it is not applicable to the foreign population.

15. In this context, it should be noted that the definition of the groups of people entitled to protection under the Convention needs to be extended to a wider circle. In fact, under the prohibition of any form of discrimination laid down in article 8 of the new Federal Constitution,[18] those entitled to such protection are not only members of linguistic, cultural or religious minorities, but all persons liable to be discriminated against inasmuch as they belong to particular social groups. To facilitate comparison between the content of this report and that of the initial report, and to ensure a certain consistency of presentation and organization between the two documents, similar subdivisions are used in describing the situation of minorities.

### B. Linguistic minorities

16. Since the 1980s, it is above all Italian and Romansch that have lost ground as national languages, both in absolute and in relative terms (percentage relative to the main languages as a whole). This tendency has continued in the period under review.[19] The percentage of German-speakers has likewise declined slightly (from 65.05 per cent to 63.6 per cent). French, conversely, is the only national language to have strengthened its position, in both absolute and relative terms (the percentage of French-speakers has risen from 18.4 to 19.2 per cent). It is mainly non-national languages that have progressed significantly.[20]

17. Information on "commonly employed" languages[21] provides indications of linguistic knowledge, multilingualism, and the use of dialect and standard language. Seventy-two per cent of the Swiss population speak German on a daily basis, 33 per cent French, 14.5 per cent Italian, 10.9 per cent English and 11.2 per cent other languages. In everyday communication, therefore, French, Italian and above all English play a much more important role than that warranted by their status as main languages. Generally speaking, it has to be said that the less widespread a language, the more uncommon it is for it to be the only language used. Only 20 per cent of Romansch-speakers can speak no language other than Romansch, 27 per cent of Italian-speakers speak only Italian and 43 per cent of French-speakers can express themselves only in French. In the case of German-speakers, 65 per cent are only able to express themselves in that language.

18. It is non-national languages that have progressed most markedly during the period under review. While 91.1 per cent of the resident population belongs to one of the four national language communities, 8.9 per cent (a figure not including seasonal workers, persons holding a short-term resident permit or asylum-seekers) speak one of the following main languages: Spanish (116,818 persons), the languages of the southern Slav countries[22] (110,270), Portuguese (93,753), Turkish (61,320), English (60,786), Albanian (35,853), other Slav languages (17,823), Arabic (17,721), Dutch (11,895) and other languages (87,311). The implications of this multiplicity of languages and the problems it poses are considered below in greater depth (e.g. when considering the difficulties caused by the increased number of classes with pupils from very diverse cultural backgrounds).[23]

### C. Religious minorities

19. Recent developments are characterized by two factors: the growth of religious communities other than the two dominant Christian faiths, and the end of the absolute majority enjoyed by the Protestants.[24] In the period under review, the proportion of the total population forming part of the Reformed Evangelical Church has continued to decline. However, Protestants still constitute the largest religious community within the Swiss national population (47.3 per cent), while 43.3 per cent profess the Roman Catholic faith. The Jewish community (0.26 per cent) and the Christian Catholic Church (0.17 per cent) have experienced a decline in membership. The proportion of members of religious communities other than national ones has risen from 2.9 per cent (1980) to 4.8 per cent.[25] It is above all the Eastern Orthodox groups (whose numbers have doubled to 72,000 or 1 per cent of the population) and the Muslim community (whose membership tripled between 1980 and 1990, reaching 152,000 or

2.2 per cent of the permanent resident population) that have recorded the sharpest rise. The figure of 152,000 Muslims, recorded during the most recent federal census, does not include seasonal workers, persons holding a short-term residence permit or asylum-seekers: in all, some 200,000 people of Muslim faith were residing in Switzerland at the end of 1999 (2.9 per cent of the population).[26] Thus, between 1970 and 1999 the Muslim minority rose from 20,000 to 200,000, notably as a result of immigration by Turkish nationals[27] and from the countries of the Balkans. Today the Muslim community is the third largest in Switzerland, after the Protestant and Roman Catholic communities.

### D. The "traveller" minority

20. The exact number of travellers living in Switzerland is not known. Some estimates put their number at about 30,000, of whom 3,000 to 5,000 have not become sedentary.[28]

## IV. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR ACTION TO COMBAT RACISM

### A. Signing and ratification of international conventions

21. Promoting respect for human rights, democracy and the principles governing the rule of law are among the chief aims of Switzerland's foreign policy.[29] In recent years, Switzerland has strengthened its international commitment by ratifying or acceding to the principal human rights instruments.[30] In this context, one thinks in particular of the two international human rights Covenants of 16 December 1966, namely the International Covenant on Economic, Social and Cultural Rights (hereafter the "first Covenant") and the International Covenant on Civil and Political Rights (hereafter the "second Covenant"), which entered into force for Switzerland on 18 September 1992.[31] Since then, the provisions of the second Covenant, articles 6 to 27 of which safeguard the traditional basic rights, are for the most part directly applicable in internal law and are treated by the Federal Court on the same footing as the ECHR.[32] In June 1994, Switzerland ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights,[33] aiming at the abolition of the death penalty. At the present time, it is studying the advisability of ratifying the first Optional Protocol to the second Covenant, which provides that any breach of individual rights (civil or political) protected under this instrument may be brought before the Human Rights Committee.[34]

22. Since the submission of the initial report, Switzerland has ratified two other essential United Nations instruments relating to the protection of human rights:

(a) The Convention on the Rights of the Child (20 November 1989), which was ratified on 24 February 1997 and entered into force for Switzerland on 26 March 1997;[35]

(b) The Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979), which was ratified on 27 March 1997 and entered into force for Switzerland on 26 April 1997.[36]

23. Similarly, at the European level, Switzerland is a party to various conventions for the protection of human rights, among which the ECHR[37] occupies a leading place.[38] Moreover, the Swiss courts make increasingly frequent reference to the provisions of these conventions in their pronouncements. It should also be mentioned that, during the period under review, Switzerland acceded to three new regional instruments for the protection of human rights, namely:

(a) The European Charter for Regional or Minority Languages, of 5 November 1992, which was ratified on 23 December 1997 and entered into force for Switzerland on 1 April 1998;[39]

(b) The Framework Convention for the Protection of National Minorities, adopted by the Council of Europe on 1 February 1995, which was signed by Switzerland on the same day, was ratified on 21 October 1998 and entered into force for Switzerland on 1 February 1999;[40]

(c) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted by the Council of Europe on 28 January 1981, which was signed and ratified on 2 October 1997 and entered into force for Switzerland on 1 February 1998.

24. In addition, Switzerland participates actively in efforts to strengthen and develop at the international level mechanisms for monitoring the observance of human rights.[41] Thus it has been one of the driving forces behind the development of a system for inspecting places of detention, established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[42] Similarly, Switzerland collaborated closely in the preparation of the Council of Europe's Framework Convention mentioned above, having assumed the presidency of the committee of government experts responsible for drawing up the text of this instrument.[43] [44]

25. In this context, it should also be mentioned that Switzerland cooperates with the international criminal tribunals responsible for prosecuting serious violations of international humanitarian law, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY), established on 25 May 1993 and based in The Hague,[45] and the International Criminal Tribunal for Rwanda (ICTR), established on 8 November 1994 and located in Arusha.[46] The prosecution of crimes committed in Rwanda and the former Yugoslavia, which were often racially motivated, contributes indirectly to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. In December 1995, the Federal Assembly adopted a decree aimed at facilitating cooperation with the international tribunals in The Hague and Arusha set up by the United Nations Security Council.[47] Under the terms of this decree, Switzerland undertook to give effect to arrest warrants and transfer requests in respect of persons against whom these bodies had instituted criminal proceedings. Pursuant to the decree, several persons were arrested and one person charged with an offence was transferred to the Arusha Tribunal.[48] For its part, Swiss military justice has carried out investigations on several occasions against war criminals from the former Yugoslavia and Rwanda[49] and, since 1995, three proceedings have been instituted in Switzerland (they resulted in one dismissal, one handing over of the accused to the International Criminal Tribunal for Rwanda, and one conviction). Thirty other proceedings are currently pending before the military courts. Switzerland is thus one of the States that is contributing most actively to the prosecution of war criminals.

26. In addition, Switzerland was from the start a driving force behind the creation of the International Criminal Court. It was among the founders of the group of like-minded States that campaigned for the establishment of a strong and independent body. Within this group, Switzerland was instrumental in shaping political will, thereby exerting an overall influence on the course of the preparatory work and the deliberations of the 1998 Rome Conference. It not only argued the case for the Court to embody institutional machinery that guaranteed its effective functioning (automatic jurisdiction, sufficiently broad scope of authority, power given to the Prosecutor to institute proceedings with complete autonomy), but it also campaigned for the Rome Statute to reflect the current state of international humanitarian law. Within the Preparatory Committee for the International Criminal Court, Switzerland continues to work unremittingly on the framing of provisions concerning the constituent elements of crimes subject to the jurisdiction of the Court and on drawing up rules of procedure and evidence. At the domestic level, the work necessary for the ratification of the Rome Statute and the framing of the corresponding legislation are well advanced.

27. On 31 March 1999, the Federal Council approved the message relating to the Convention for the Prevention and Punishment of the Crime of Genocide, and also the corresponding revision of the criminal law (in particular, a new CPM article 221).[50] This text was adopted by the two legislative councils in March 2000. The Convention will probably be ratified in October 2000 and enter into force for Switzerland on 1 January 2001.

## B. Reform of the Federal Constitution

### 1. The constitutional reform in substance

28. On 18 April 1999, the people and the cantons accepted a new Federal Constitution (NFC).[51] In relation to the Old Federal Constitution (OFC) of 1874, the new basic law faithfully reflects the written and unwritten constitutional law of our time. It fills some legal gaps and makes good the shortcomings of the OFC, which had undergone over 140 partial revisions, with a consequent loss of much of its internal consistency. Nevertheless, the reform of the Constitution is essentially an "updating", involving only a few substantive innovations (see annexed text of the NFC).

29. The overall process of reform, based on a "graduated approach", resolves essentially into three elements.[52] These are: first, the "updating" of the OFC; then the reform proposals relating to people's rights, i.e. the instruments of direct democracy; finally the proposals for reforming the judiciary. While the first stage, now completed, did not result in any substantive innovations, the new Federal Constitution addresses many unresolved issues, contains some innovative proposals on matters of substance (e.g. those governing relations between the Confederation and the cantons), and abolishes a number of provisions that have been rendered obsolete by the changes that have taken place in society over the last 120 years.

30. The main innovations of the new Federal Constitution are the following:

(a) It is clearly structured and titles are used for each subdivision (article, section, chapter, part);

(b) The language is modern yet preserves expressions that form a link with Switzerland's past when prescribing rules in sensitive areas such as relations between the Confederation and the cantons;

(c) Detailed provisions that had no place in the Constitution have been eliminated (enabling the length of the text to be reduced by over 30 per cent, despite the fact that the constituent body has included in it a substantial number of items of previously unwritten constitutional law);

(d) The principles governing the activity of the State, such as those of good faith, legality and the safeguarding of public interests, are now expressly mentioned;

(e) The text includes a complete catalogue of fundamental rights and expressly establishes the principle of equality of opportunity;

(f) A new provision is included on social purposes;

(g) It embodies provisions establishing the responsibility of individuals and society, and also the responsibility of the latter to future generations;

(h) A chapter is devoted to relations between the Confederation and the cantons;

(i) A specific part deals with people's rights.

31. Fundamental rights - which were treated in a haphazard way in the OFC, were protected under different international conventions or else were recognized under unwritten constitutional law by the decisions of the Federal Court and in the practice of the bodies responsible for applying these conventions - are now consolidated in a single section (NFC, arts. 7 to 36). Thus the new Constitution now includes specific provisions on fundamental rights such as the right to life and personal freedom, the right to human dignity, the principle of non-discrimination and freedom of opinion.

32. The reform of the legal system is embodied in the first set of measures of an institutional character, whereby the Federal Council intends to renew progressively the substantive law contained in the NFC, which came into force on 1 January 2000. This project, which was voted on 12 March 2000, introduces significant improvements. As regards the main outlines of the reform of the legal system (lightening the workload of the Federal Court, unifying the law governing civil and criminal proceedings, improving jurisdictional protection), reference should be made to the observations developed below in paragraphs 124 et seq. of Part Two.

### 2. Articles 7 and 8 of the Federal Constitution

33. Articles 7 and 8 of the updated Federal Constitution constitute the essential legal foundations of the fight against racism. Article 7 of the Constitution provides for general protection of human dignity, stipulating that:

"Human dignity shall be respected and protected."

34. Article 8, paragraph 2 of which lays down the general prohibition of discrimination,[53] is worded as follows:

"Article 8. Equality

1. Everyone is equal before the law.

2. No one shall be subjected to discrimination on account of his or her origin, race, sex, age, language, social position, way of life, religious, philosophical or political convictions, any physical, mental or psychological disability.

3. Men and women have equal rights. The law shall provide for legal and practical equality, particularly in the realm of the family, education and work. Men and women are entitled to equal remuneration for work of equal value.

4. The law shall make provision for measures to eliminate the inequalities affecting disabled people."

### C. Overview of the revisions of federal legislation

35. This report deals fairly extensively with the relevant provisions of federal legislation and the legislative revisions in progress in its analysis of the corresponding provisions of the Convention (see Part Two of the report). However, the main reforms that Swiss legislation has undergone in the period under review may be outlined here briefly.

#### 1. Swiss Criminal Code and Military Criminal Code

36. By way of introduction, it should be recalled that the accession of Switzerland to the Convention entailed a revision of the Swiss Criminal Code (introduction of CP article 261 bis)[54] and of the Military Criminal Code (CPM art. 171 (c)).[55] The new provisions entered into force on 1 January 1995.[56] In addition, the first part (General provisions) of the Swiss Criminal Code is currently being revised.[57] The main aim of this reform is to restructure the system of penalties. The secondary intention is to create a penal system that is better balanced in terms of the values inherent in the rule of law.[58] Finally, a bill concerning the criminal law relating to minors is still pending.

37. At the beginning of 1998, an expert commission submitted its report on the harmonization of the different cantonal codes of criminal procedure.[59] The main aim of this report was to highlight the essential features of a future code of criminal procedure applicable throughout Switzerland. The reform of the legal system referred to above will lay the constitutional foundations for the harmonization of civil and criminal procedure.

#### 2. Civil Code and Code of Obligations

38. During the period under review, the Swiss Civil Code (CC)[60] underwent substantial revisions relating to civil status, marriage, children's rights, maintenance obligations, refuges, guardianship and marriage brokerage. Adopted by Parliament on 26 June 1998, these changes came into force on 1 January 2000.

### 3. Other reforms and recasting of legislation

39. Over the same period, major reforms were carried out in other areas of federal law. Some of them are still under way. In the context of the reform of the legal system, particular mention must be made of the Federal Court Bill, which is intended to replace the Federal Act concerning Judicial Organization (OJ) of 16 December 1943.[61] This reform has been put in hand mainly because of the chronic backlog besetting the Federal Court and is intended above all to improve the functioning of this Court.

40. In the area of law governing the status of foreigners, various enactments have recently come into force or are in the process of being drawn up:

(a) The Asylum Act (LA)[62] has been completely reworked and the new text came into force on 1 October 1999. Its provisions include new rules governing the granting of temporary protection, thereby improving the status of people fleeing war and seeking temporary refuge in Switzerland;[63]

(b) The draft Federal Bill concerning Foreigners (LFE) provides in general for improved status for foreigners living in Switzerland. It is specifically aimed at establishing clear regulations on eligibility for a residence permit, regulations that take account of long-term economic requirements and humanitarian needs. The new bill thus aims to strengthen the integration of foreigners who are permanently and legally resident in Switzerland;

(c) The Federal Act concerning the Temporary and Permanent Residence of Foreigners (LSEE)[64] has acquired a new article 25 (a), which came into force on 1 October 1999.[65] It governs the financing of integration projects by the Confederation.[66] The implementing order for the new provision is currently being drawn up.

## D. Reform of the cantonal constitutions

41. A number of recent reforms of cantonal constitutions have involved provisions clearly prohibiting discrimination (e.g. article 10 (1) of the Constitution of the canton of Bern of 6 June 1993[67] and article 5 (2) of the Constitution of the canton of Appenzell-Innerrhoden of 30 April 1995).[68] In several cantons,[69] a comprehensive reform of the cantonal constitution is under way. It may be supposed that the formulation of fundamental rights and the prohibition of discrimination will figure prominently in the discussions.

## E. Case law of the Federal Court concerning racial discrimination

42. During the period in question, the Federal Court has been called upon several times to deal with offences under CP article 261 bis.[70] Mention should also be made of the numerous decisions relating to fundamental rights and guarantees embodied in the Constitution, the ECHR and the second Covenant, decisions that, in each case, have served to clarify specific questions relating to one or other aspect of the said rights and guarantees.[71] Attention should also be drawn to the case law of the Federal Court relating to the problems of religious minorities and, more specifically, to the religious aspects of schooling. In this regard, the case law of the Federal Court is habitually characterized by tolerance.[72] Thus, in a decision of 21 June 1999,

the highest court in the country ruled that access to a State school could not be subject to the condition that the pupil should belong to a particular religion and, while it was legal for faith-based schools to exist, it would be unconstitutional if they were to restrict to members of a given religion the possibility of receiving education in a minority language.[73] Moreover, when called upon to rule on the case of a Geneva teacher who wore an Islamic headscarf,[74] the Federal Court did not approach the question in isolation, but concluded that the same considerations applied to other powerful religious symbols (such as the cross, the cassock, the kippa or the chador).

43. The most important decisions will be reviewed again when analysing the relevant articles of the Convention.

## V. GENERAL POLICY FOR COMBATING RACIAL DISCRIMINATION

### A. General remarks

44. The Swiss Government considers that it has an ongoing duty to engage in the action to combat racism, anti-Semitism and xenophobia. In its countless replies to parliamentary questions and opinions on motions,[75] and in the recommendations it made to the Federal Commission against Racism (CFR),[76] the Federal Council has showed how sensitive it was to this problem. In these texts, it stated that it has continued to attach great importance to action to combat all forms of racism, anti-Semitism and xenophobia, and highlighted the central role given to raising public awareness and preventive measures in this action. Some of the most illustrative examples of the Federal Council's position are mentioned below:

(a) In June 1997, in response to a motion tabled in Parliament, the Federal Council highlighted the importance of research and education in the fight against anti-Semitism and racism.[77] Subsequently, it mandated the Council of Federal Polytechnic Schools to take appropriate action on the demands of the motion;

(b) On 5 March 1997, Mr. A. Koller, who was President of the Confederation at the time, addressed the Federal Assembly on the subject of the creation of the Swiss Foundation for Solidarity. He stated that the Federal Council was planning to grant a sum of 7 billion Swiss francs to the Foundation;

(c) In a policy statement on 5 November 1998 concerning the CFR's report on anti-Semitism in Switzerland, the Federal Council made a commitment to spare no effort in continuing its policy of combating anti-Semitism. It reiterated this in its reply to the question of 14 December 1998 by Mr. Loeb, a National Councillor, about the above-mentioned report.

### B. National minorities

#### 1. Linguistic minorities

45. On 23 December 1997, Switzerland ratified the European Charter for Regional or Minority Languages of 5 November 1992, and it entered into force on 1 April 1998. Under this charter, Switzerland made a commitment to promote the least widely spoken of its national and official languages, namely Italian and Romansch.[78]

46. By approving, on 10 March 1996, the article of the Constitution on languages (OFC, art.116) - previously mentioned in Switzerland's initial report - the people and the cantons showed their desire to promote quadrilingualism and to encourage exchanges between the linguistic communities. This constitutional amendment gave Romansch the same status as German, French and Italian, namely that of a national and official language, allowing Romansch-speaking citizens to address the federal administrative or judicial authorities in that language (this provision was also given effect in NFC article 70 (1).[79] Moreover, pursuant to OFC article 116 (2), the Confederation would, in agreement with the cantons, perform important new tasks in the future to promote the national languages and would, in particular, take measures to encourage understanding and exchanges between the linguistic communities. This aim was incorporated in NFC article 70 (3), according to which "the Confederation and the cantons shall encourage understanding and exchange between the linguistic communities". Under the new Constitution (art. 70 (4)), the Confederation has the additional task of supporting the multilingual cantons in the fulfilment of their particular tasks. The legislative provisions needed to implement the above-mentioned constitutional provisions are currently under preparation. They will regulate the use of the Confederation's official languages and, more specifically, Romansch as an official language in certain fields, and will encourage understanding and exchanges between linguistic regions by means of measures taken by the Confederation, measures taken jointly by the Confederation and the cantons, measures taken by the cantons with the Confederation's support, and measures taken on a third party's initiative. The new legislation will also regulate the support given by the Confederation to the multilingual cantons in the fulfilment of their particular tasks.

47. Like OFC article 116 (3) article 70 (5) of the new Constitution gives the Confederation the power to support the measures taken by the cantons of Graubünden and Ticino to protect and promote Romansch and Italian. The amendment of the Federal Act concerning Financial Assistance for the Protection and Promotion of the Romansch and Italian Languages and Culture of 6 October 1995,[80] which entered into force on 1 August 1996, has enabled such assistance to be granted over the last few years. The aim of this amendment was twofold: first, to allow an increase in federal subsidies to promote Romansch and Italian, and secondly, to enable the cantons, communes and organizations involved to strengthen their action in the area of language policy.[81] In 1999, the aid in question totalled 4,631,300 francs for the canton of Graubünden and 2,246,132 francs for Ticino.

48. The new Federal Constitution has enabled freedom of language to be added to the list of fundamental rights (NFC article 18 states: "Freedom of language is guaranteed"), while establishing the principle of language territoriality, which aims to preserve the country's traditional linguistic landscape, and thereby to contain the four linguistic regions within their traditional limits and to protect their homogeneity (NFC art. 70 (2)).

### 2. Religious minorities in general

49. During the period under review, increased attention has been paid to Switzerland's Muslims, who number around 200,000. It is largely the cantons that are called upon to act in this area, as it seems easier to enter into a dialogue at the cantonal level. Some of the successful initiatives in this field worth mentioning are the Muslim community contact group in the canton

of Neuchâtel, the regular meetings held between the Basel-Stadt cantonal authorities and the Commission for Islamic Affairs, and the Swiss Christian and Muslim Community, which was instrumental in the opening of a Muslim cemetery in Bern in 1999. In addition, the recognition of the Islamic religious communities in public law is once again under discussion.[82]

### 3. Combating anti-Semitism in particular

50. There is no doubt that, for centuries, Jewish people have been subjected to discrimination and persecution. Criminal sanctions for acts of racial discrimination must therefore focus above all on anti-Semitic activity. In 1997 and 1998, at the time of the public debate on Switzerland's role during the Second World War, the federal police noted an upsurge of anti-Semitic propaganda. The Swiss authorities reacted very swiftly to this phenomenon, as illustrated by the facts below.

51. First of all, the unshakeable determination shown by Switzerland during the inquiry it conducted into its policy during the Second World War should be highlighted. In October 1996, the Federal Council created a coordinating body, the "Switzerland - Second World War" task force responsible for conducting studies and implementing practical measures relating to this issue. In this context, two highly significant areas of investigation should be mentioned. They are of particular interest to the general public, namely, Switzerland's policy towards refugees and the issue of unclaimed assets in Swiss banks. On 19 December 1996, the Federal Council appointed an independent expert commission, headed by Professor Jean-François Bergier, to study the period preceding, during and immediately following the Second World War, paying particular attention to the war years (1939-1945).[83] In December 1999, the commission submitted its first report on the results of its research (hereafter the "Bergier report"). Within the framework of the studies and analyses resulting from this report, even foreign experts were given totally free access to the national archives, a fact which was welcomed as unique.[84]

52. In a statement on 10 December 1999, on the occasion of the publication of the report entitled Switzerland and refugees in the Nazi era, the Federal Council declared in particular:

> "A very large majority of the people of Switzerland rejected the racist ideology of the Nazis. In the face of Nazi barbarism, and despite the very difficult circumstances with which it was confronted, our country managed to remain an island of freedom and democracy in the heart of Europe. The Federal Council pays tribute to our fellow citizens at that time, who contributed to this. A large number of both civilian and military refugees were accepted by Switzerland. The Federal Council shares the sentiments of the refugees who remember with gratitude and respect the men and women who helped them to seek refuge in Switzerland and to live there (...). The fresh awareness prompted by a report of this kind should not induce us to judge those responsible at the time against current standards. On the contrary, it should act as an encouragement for the future, so that the errors of the past are never repeated. For the Federal Council, this is an opportunity to reaffirm our country's commitment to the service of human rights. In cooperation with other States, Switzerland means to pursue its contribution to the continued development of an international legal order which protects every individual from all forms of persecution and violence. In the same spirit, the Federal Council intends to reinforce its support for the development of greater

awareness of human rights and the prevention of racism. In the coming months it will work out the practical details of the form which this support will take, in co-operation with the cantons and interested organisations."

53. In this context, the CFR's report on anti-Semitism in Switzerland, submitted to the Federal Council in autumn 1998, should also be mentioned. This report advocated in particular the adoption of preventive measures at the political level, and also at the governmental and administrative levels.

54. The issue of "unclaimed assets"[85] in Swiss bank accounts has seriously jeopardized the future of internationally-orientated Swiss banking institutions. In the United States, lawyers lodged collective complaints against several large Swiss banks and issued threats to boycott them. They even withdrew assets totalling 20 billion francs, leading the Swiss Bankers' Association to appoint a commission of high-level experts to trace the owners of the unclaimed assets or their rightful heirs. The Association succeeded in convincing Mr. Paul Volcker, former head of the American Federal Bank, to chair the commission. Known as the "Volcker Commission", it conducted an inquiry, whose scope and cost were unprecedented in banking history,[86] to find the owners of the unclaimed assets: 650 auditors from all over the world checked 4.1 million accounts in 245 Swiss banks and compared them with the 5.5 million names of Holocaust victims. The results of the inquiry were submitted at the beginning of December 1999.[87]

55. The fact that Switzerland's study of its recent past (the period 1939-1945) was so thorough and unrestricted has been recognized and greeted with respect both in Switzerland and abroad.[88]

### 4. The "travellers" minority

56. The initial report (para. 40) has already drawn attention to the fact that, in the course of the twentieth century, travellers in Switzerland suffered harassment or even persecution. At the beginning of June 1998, the results of a first official study on the "Children of the Road" Mutual Aid Association were submitted to a representative of the Federal Council. For the purposes of this study, the Association's documents that had been placed in the federal archives were scientifically analysed for the first time.[89] The study concluded that between 1926 and 1973 the mutual aid in question had been extremely damaging to the lives of a number of people, splitting up many families and discriminating against the "Jenisch" culture. The Pro Juventute Foundation acknowledged the historians' verdict and officially apologized. The Federal Department of Home Affairs (DFI) consulted the cantons, which agreed that the report was a matter of concern. On 12 January 2000, in the light of the results of this consultation, the Federal Council decided that a simplified version of the report should be drawn up for use in schools and training institutions, and that the document should be translated into French and Italian, in order to promote and coordinate future research on the subject in conjunction with the cantons.

57. On 1 May 1997, the Confederation established the Foundation entitled "Ensuring the Future of Swiss Travellers",[90] responsible for contributing towards improving travellers' living conditions and safeguarding their culture. The Foundation's aim is to find solutions to the main

problems encountered by these people, namely, those relating to parking sites, itinerant traders' licences and schooling for children. The Foundation serves primarily as a forum in which the representatives of travellers, communes, cantons and the Confederation work together to find solutions. Another of its tasks is to act as an intermediary in resolving specific problems. The Foundation also has a mandate to raise public awareness of the specific needs of travellers, through various projects.

58. The main problems currently encountered by travellers in Switzerland are the shortage of permanent and temporary parking areas and the variations in cantonal regulations regarding itinerant commerce.[91] An evaluation is currently being conducted, with the cooperation of the Radgenossenschaft der Landstrasse, to identify travellers' needs (survey of existing parking areas in cantons and communes, and additional places needed). This evaluation will then form the basis of future action by the authorities. The DFI, for its part, has consulted the cantons on the situation of the itinerant population. The results have been notified to the Federal Council and cantonal governments, and transmitted to the Foundation for use as a point of reference.

59. Finally, it is worth mentioning the report of the State Secretariat for Economic Affairs (SECO) on the advisability of Switzerland acceding to ILO Convention No. 169 concerning Indigenous and Tribal Peoples. The report contains a detailed analysis of the legal status of travellers in Switzerland and examines the draft legislation being developed at both the cantonal and federal levels (with particular reference to the revision of legislation on itinerant commerce).[92]

## C. Foreign population

### 1. Immigration issues

60. Part Two of this report will discuss Swiss immigration policy in greater detail. It should nonetheless be pointed out that, since the submission of the initial report, the Federal Council has continued to seek new solutions to the problems arising from the integration and immigration policy; furthermore, efforts have been made to improve coordination between asylum policy and policy towards foreigners in general.

### 2. Admission and quota policy in general

61. When, on 1 November 1998, the Federal Council adopted the partial revision of the Ordinance limiting the number of foreigners (OLE),[93] it opted for the dual admission system under which yearly residence permits for those engaged in gainful activity are given first and foremost to nationals of the member States of the European Union and EFTA. In fact, Switzerland already has very close political, economic and cultural ties with these States, which should become even closer as a result of the bilateral sectoral agreements concluded between the European Union and Switzerland, particularly those relating to the free movement of persons. Switzerland has therefore abolished the "three-circle model" that had been criticized by the Committee.[94]

### 3. Asylum policy in particular

62. There has so far been a fairly large divide in Switzerland, at both the institutional and the juridical levels, between asylum policy and policy towards foreigners. In practice, however, the two often overlap and are interrelated. Therefore, steps are currently being taken to develop a comprehensive immigration policy that would allow for a closer association between asylum policy, policy towards foreigners and labour market policy. Swiss asylum policy is governed by the following principles, which embody the chief characteristics of Switzerland's humanitarian tradition:

(a) Anyone threatened or persecuted in his or her State of origin according to the criteria recognized by public international law is granted asylum in Switzerland;

(b) In regions devastated by war or disaster, Switzerland endeavours to provide rapid relief on the spot to people in distress. It participates in organized international campaigns to protect and support the affected populations;

(c) When it is too dangerous to intervene in a particular region, groups of affected people are received on Swiss territory; and

(d) The Federal Council endeavours, in cooperation with the Governments of other States, to adopt effective and lasting solutions to avert flight and involuntary migration.

63. In recent years, parts of the Federal Act on Asylum (LAsi) have been constantly revised in order to provide Switzerland with the legal instruments enabling it to address emerging trends in this field. The result was a complicated series of supplementary provisions and ordinances. To rectify this situation, the LAsi underwent total revision. The new LAsi of 26 June 1998 entered into force on 1 October 1999,[95] not only setting out a clear system but also introducing additional measures to combat abuse of the asylum procedure.

64. Switzerland remains aware of its humanitarian duty to help people who are victims of persecution in their country of origin. The new law thus confers a stronger legal status on people who, fleeing their country in a situation of war, seek temporary refuge in Switzerland. The new law actually introduces the concept of "persons in need of protection", who may be granted "temporary protection".[96] Through these new measures Switzerland intends to grant its protection not only to refugees, but also to "persons in need of protection" who do not meet the conditions of the Convention relating to the Status of Refugees of 28 July 1951[97] or of the Asylum Act. In fact, the measures concern persons who have fled their country of origin for reasons of war, widespread violence or systematic human rights violations, without necessarily always being personally exposed to the danger of cruel, inhuman or degrading treatment or punishment. If the situation in their country does not improve, such persons are granted a limited residence permit five years after being granted temporary protection; this permit is valid until the withdrawal of temporary protection. After 10 years, the host canton may grant them a permanent residence permit.

65. In this context, another instrument that should be mentioned is temporary admission. This is ordered if return is impossible or illegal or cannot reasonably be required (LAsi, art. 44 (2); LSEE, art. 14 (a) (1)). Since the new Asylum Act entered into force, the Federal Office for Refugees (ODR) can, moreover, order temporary admission in situations of serious personal distress, if no enforceable decision has been rendered in the four years following deposit of the application for asylum (LAsi, art.44 (3)).

66. The "Humanitarian Action 2000" programme should also be mentioned. On 1 March 2000, the Federal Council decided, as an exceptional measure, to accept on a temporary basis various groups of asylum-seekers and foreigners who had entered Switzerland before 31 December 1992, provided they had not been abusing the system in order to prolong their stay and they were well integrated in Switzerland. In principle, the regulations adopted under this programme concern about 30,000 people, about half of whom are nationals of Sri Lanka. The length of their stay has been due either to the situation in their State of origin, or to the Swiss authorities' decision to give priority to other cases. The Federal Council considers that people who have been staying in Switzerland for many years should by now know whether or not they are able to remain here. In recent years, the conflicts in Bosnia-Herzegovina and Kosovo have a considerable impact on asylum matters. Now that the situation has returned to normal and there are fewer asylum-seekers, the asylum authorities can devote themselves to resolving pending cases systematically.[98]

67. At the end of 1998, some 45,000 applications for asylum were pending with the ODR or the Swiss Asylum Appeals Commission.[99] At that time 28,400 people whose asylum applications had been rejected were still residing in Switzerland. In 1998, 9.5 per cent of asylum-seekers (2,032 people) were granted refugee status and obtained asylum. By the end of 1998, therefore, about 24,500 people had been recognized as refugees in Switzerland and had permission to stay for a significant length of time. In 1999, largely because of the war in Kosovo, Switzerland registered 46,068 new applications for asylum, an increase of 11 per cent.[100] In that year, 2,050 asylum-seekers were granted refugee status, representing an average acceptance rate of 5.7 per cent. Twenty-seven thousand, one hundred and forty-three requests were rejected; Switzerland also refused to consider 6,693 requests. A further 11,378 cases fell into the category of "Other decisions", which mainly comprises cases where asylum applications were withdrawn following implementation of the Return to Kosovo Assistance Programme (para. 68 below). With regard to the processing of applications, the average length of the procedure at first instance was 127 days. By the end of 1999, Switzerland had registered 46,068 new asylum applications, which meant that, in absolute terms and on a global scale, Switzerland ranked third after the Federal Republic of Germany (88,239 at the end of November 1999) and the United Kingdom (64,140). The ODR expects some 19,000 asylum applications in 2000. It considers that annual spending in this field (some 1.5 billion francs) should gradually decrease to 1 billion francs by 2003.

68. The Return to Kosovo Assistance Programme, established by the Federal Council and consisting of a series of payments designed to facilitate the returnees' reintegration in their country of origin, led to the prompt and voluntary return of Kosovars driven from their province by the war. Such were the results of the first two phases, the second of which ended on 31 May 2000. By the end of 1999, 15,830 people had voluntarily returned to the Balkan region; by 23 May 2000, 22,271 people had voluntarily returned to their country of origin on special

flights chartered by the ODR, in cooperation with the International Organization for Migration. In this connection, mention should also be made of the role played by Swiss mutual aid organizations and the Swiss army abroad.[101] Assistance to victims of the conflict in the former Yugoslavia represents the most extensive humanitarian activity ever undertaken by Switzerland.[102]

### 4. Integration policy

69. The Government of Switzerland has repeatedly stated its willingness to strengthen the measures taken at all political levels to promote integration. "Integration" is understood to mean both the reception given to foreigners within the Swiss community and their ability to become a part of the social setting, without giving up their own cultural origins and nationality (initial report, para. 46). Integration measures should, however, apply only to people who will be living in Switzerland for a relatively long period. Where asylum-seekers are concerned, priority should be given to measures designed to facilitate their return. The Federal Council is opposed to the general integration of all foreigners whose stay in Switzerland is of limited duration.[103]

70. The most progress in integration policy has been made at the commune level. Thus the cities of Bern, Zurich, Basel and St. Gallen and the canton of Lucerne have developed specific approaches to guide their integration policies. In these communities the integration of foreigners is considered to be a tool of social policy and an economic necessity; a number of communications have in fact been issued to this effect.

71. Against this background, attention should also be drawn to the crucial role played by the Federal Commission on Foreigners (CFE), which was established under the LSEE during the period under review.[104] The CFE has been empowered to propose payments of subsidies for the social integration of foreigners and to take decisions on applications for subsidies submitted under LSEE article 25 (a).[105] This provision enables the Confederation to provide financial support for integration projects developed by the cantons, communes or others. Mention should also be made of the CFE report on integration of 22 October 1999. The report's recommendations include the expansion of language courses and advanced vocational training for adult foreigners, increased involvement of foreigners in political decision-making and the implementation of projects designed to promote the integration of foreign children in school. The Federal Department of Justice and Police (DFJP) has asked the ODR to prepare an ordinance on integration based on the report and on article 25 (a) of the LSEE; the ordinance is due to enter into force on 1 October 2000. For 2001, 5 million francs has been budgeted in support of the above-mentioned projects. This figure will subsequently be raised to 7.5 million francs.

72. Lastly mention should be made of the integration measures which the ODR makes available to persons with recognized refugee status. Once the decision to grant asylum has been made, irrespective of level of need, refugees receive a one-time payment to enable them to take a language class (Ordinance No. 2 concerning asylum, art. 22, (1)).[106] In addition, refugees on social assistance receive a one-time payment as an installation grant (art. 22 (2)). The ODR can also reimburse specific payments to promote employment, such as wage costs, introductory training, refresher training, retraining and integration (art. 45, (5)). And the ODR partially defrays the cost of refugee integration projects (art. 45). The 2000 budget contains a 4 million francs allocation for the above-mentioned projects.

## D. Campaigns against racism

### 1. At the national level

73. It should first of all be noted that, during the period in question, action to combat racial discrimination has been stepped up and expanded at various levels. At the federal level, a number of specific activities have been conducted in recent years, including the following:

(a) A report on political extremism in the army, dated 16 December 1998, which concluded that extremist tendencies among army personnel more or less mirror those found in the civilian population and that the incidents that have occurred were no more than isolated cases. The report states unequivocally, however, that firm punishment must be meted out for such incidents and that no extremist activities should be tolerated within the army. In keeping with this approach, the Federal Department of Defence, Civil Protection and Sports (DDPS) will consider, in cooperation with the competent agencies, the advisability of taking other preventive measures and putting them into practice if necessary;

(b) Switzerland plays a leading role in the international campaign against racist and anti-Semitic Internet sites (see para. 254 below). To this end, it supported the organization of an expert seminar in Geneva from 16 to 18 February 2000 in connection with the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The seminar addressed legal and technical questions relating to acts of racism committed over the Internet;

(c) The establishment of a national human rights agency is currently being studied within the Confederation. On 4 November 1999, the National Council decided to give effect to the parliamentary initiative entitled "Human rights. Establishment of a mediation service".[107] The commission responsible for studying the draft will decide on the form this measure should take (establishment of a mediation service or appointment of a human rights official);

(d) Reports of the Federal Commission against Racism: "Diskriminierungsverbot und Familiennachzug" (1998, German only); "L'antisémitisme en Suisse" ("Anti-semitism in Switzerland") (1998); "Des classes séparées?" ("Separate classes?") (1999); "Les musulmans en Suisse" ("Muslims in Switzerland") (1999), and the symposium of 18 January 2000 on this subject.

### 2. At the international level

74. Switzerland participates in numerous activities undertaken by the international organizations to strengthen the protection of minorities and thereby counteract - directly or indirectly - racist activities. The following non-exhaustive list provides some examples of its efforts:[108]

(a) Cooperation with the European Commission against Racism and Intolerance (ECRI) of the Council of Europe:[109]

(b) At the Conference on Holocaust-Era Assets, held in Washington in December 1998, Switzerland announced its readiness to host, via the Internet, an international conference on racism and anti-Semitism;

(c) On the occasion of its participation in the Stockholm International Forum on the Holocaust (26 to 28 January 2000), the Swiss Government again warned against the Internet's potential for abuse;

(d) Participation in the joint Council of Europe/European Commission "national minorities" programme (e.g. participation in the Conference of Governmental Delegates for National Minorities);

(e) Support for the initiatives of the Organization for Security and Cooperation in Europe (OSCE): in particular, the conference entitled "Governance and Participation: Integrating Diversity", held at Locarno from 18 to 20 October 1998, which addressed the integration of national minorities into decision-making processes at the national level;

(f) Mention should also be made of the Charter for European Security, adopted at the OSCE Istanbul Summit (18 and 19 November 1999): in the negotiations on the Charter, Switzerland expressed support for consideration of the interests of minorities;

(g) Switzerland provides support for the Office of the United Nations High Commissioner for Human Rights in specific areas: project funding, appointment of a project coordinator (Mr. Michael Murrezi, since spring 1999);

(h) Participation in the Council of Europe working group on Roma and Sinti;

(i) Participation in the Working Group on Minorities and the Working Group on Indigenous Populations;

(j) Promotion of human rights and mutual understanding through development cooperation (see activities conducted by the Swiss Agency for Development and Cooperation (DDC)).

## PART TWO: CONSIDERATION OF THE IMPLEMENTATION OF ARTICLES 2 TO 7 OF THE CONVENTION

### I. CONDEMNATION OF RACIAL DISCRIMINATION (ART. 2)

#### A. Respect for the principle of equal treatment by the State (art. 2 (1) (a) and (b))

75. As stated in Part One of this report, on 18 April 1999 the people and cantons approved the new Federal Constitution, (NFC), which entered into force on 1 January 2000. The general principle of equality before the law and the prohibition of discrimination contained in article 4 of the old Federal Constitution (OFC) has given rise to well-established case law,[110] which the new Constitution in no way contests. On the contrary, NFC article 8 expressly provides:

"Article 8. Equality

1. Everyone is equal before the law.

2. No one shall be subjected to discrimination on account of his or her origin, race, sex, age, language, social position, way of life, religious, philosophical or political convictions, or any physical, mental or psychological disability."

76. It will be seen that, compared with article 4 of the old Constitution, article 8 (1) of the new Constitution clearly stipulates that the principle of equality before the law applies not only to Swiss citizens, but to everyone. This modification takes into account the case law of the Federal Court and long-prevailing legal opinion, pursuant to which foreigners, too, may cite article 4 of the old Constitution.[111] However, the principle of equality before the law requires that identical situations be treated in the same manner, as their similarities would dictate, and that different situations be treated in a different manner, as their differences would dictate.[112] It follows from this principle that unequal treatment may be acceptable when justified by objective, serious arguments, i.e. when the situations in which two persons or groups find themselves differ to such an extent with regard to important aspects that, given the actual situations, different treatment appears warranted.

77. When the report was being prepared, there had not yet been any legal decision relating to article 8 (1) of the new Constitution, but it is clear that it is a mere updating of OFC article 4 (1) and that current case law continues to be applied. This report will thus confine itself to the Federal Court's case law, which would have it that the Court shall consider, in the light of NFC article 8,whether a regulation or interpretation of a rule of law establishes legal distinctions which, in the situation in which the rule applies, do not have reasonable grounds or whether it neglects to recognize distinctions which are objectively imperative.[113] Equal treatment is required only when the circumstances are essentially the same. Different situations should be treated as a function of their objective differences.[114]

78. The obligation to ensure equality before the law guarantees a graduated legal order, based on objectively based distinctions.[115] It follows that positive inequality of treatment - i.e. specific provisional measures taken for the benefit of particularly disadvantaged groups and intended to correct previous or current discrimination - is not only lawful from the standpoint of constitutional law, but may even be imperative under certain circumstances.[116] But such measures may aim only to eliminate existing prejudices so that groups hitherto disadvantaged under the constitutional system may be put back on an equal footing with the others; they may not give them advantages as such.

79. Article 4 (2) of the old Constitution provided explicitly for the prohibition of discrimination only in the case of discrimination on grounds of sex; the new Constitution also covers other areas. It prohibits, inter alia, discrimination on account of race, ethnic origin, language or religious belief, i.e. on account of a characteristic with a negative connotation, against a particular person as compared with another who is in the same situation but does not have that characteristic.[117] The guarantees defined in NFC article 8 (1) and (2) accordingly prohibit making distinctions between persons and thus discriminating against some of them

merely because they are of foreign origin or of another culture or religion. Pursuant to this provision, therefore, the majority may not penalize, by means of unequal treatment, members of a minority on account of their origin or their linguistic, cultural, ethnic or other characteristics.

80. It should be noted in this connection that the Federal Court has clarified its case law in two decisions on the conditions in which foreigners may invoke freedom of commerce and industry. In a decision of 26 February 1997 (ATF, 123, I, 19) concerning the admission of a foreign national to a legal traineeship, the Federal Court considered that a foreigner holding an annual residence permit, which is subject to the restrictions set by the Foreigners Registration Office, may not, in applying for the said traineeship, claim freedom of commerce and industry on the same basis as a foreigner holding a permanent residence permit (see also para. 130 below). In another decision, rendered on 4 July 1997 (ATF, 123, I, 212), the Federal Court nevertheless considered that a foreigner who is exempt from labour market limitations and is entitled to renewal of his temporary residence permit under LSEE article 7 (1) could claim freedom of commerce and industry.

### B. The problem of discrimination between foreigners and the reservation made by Switzerland in respect of its immigration policy (art. 2 (1) (a))

81. At the time of submission of the initial report, Swiss policy towards foreigners was still based on two principles: limiting the number of foreigners and integrating foreigners living and working in Switzerland (see initial report, paras. 54 et seq.). While the admission of students and trainees, particularly in the area of technical cooperation, was based on the same criteria as those applying to all foreign nationals, the "traditional recruitment country" system was applied for admission to employment. The authorities had introduced that policy, known as the "three-circle model", in the early 1990s in order to recruit foreign workers.[118]

82. Since then, Swiss integration and immigration policy has been partially revised. In 1998, the "three circle" model was abandoned.[119] In revising the regulations on foreigners in 1998 and 1999, the Swiss Government replaced the "three circle" policy[120] by a "binary admission system",[121] in line with the proposals in the final report of the expert commission on migration (August 1996). Most of the persons from countries belonging to the old middle circle (United States, Canada, Australia and New Zealand) to whom Switzerland had issued permits before 31 October 1998 were highly qualified. Thus, in practice the revision of the recruitment system does not entail any suitable change. As long as positions cannot be filled by unemployed Swiss nationals or foreigners residing in Switzerland who have a work permit and are seeking employment, persons may be recruited on a priority basis from member States of the European Union and EFTA.

83. The federal and cantonal employment offices may derogate from this principle and agree to exceptions for persons from other countries provided they are highly qualified and special reasons warrant such an exception. As in the past, such permits will be issued within fixed quotas, priority being given to national workers, subject to the principle of equality of working conditions and wages. Admission on humanitarian grounds in the context of training programmes linked to aid and development projects or for purposes of family reunification will, however, continue and is independent of the binary recruitment principle.

84. The criterion of capacity of foreigners for integration, which the initial report discussed in detail (paras. 54 and 56), is no longer of any relevance under the binary admission system.

85. As regards the Convention, the favoured treatment granted to nationals of Western European countries within the framework of the close trade relations established, which the seven bilateral sectoral agreements of 21 June 1999 between Switzerland and the European Union are expected to strengthen further, does not pose any problems of principle.[122] One of the seven agreements lays down general regulations on the free movement of persons. Although the Convention does not contain any general reservation on special treaties according privileges, such agreements are, in the opinion of the Federal Council, compatible with the Convention insofar as they are made within the framework of close economic alliances and on the basis of reciprocity.[123] Closer consideration will need to be given to the possibility of withdrawing Switzerland's reservation on article 2 (1) (a) once the bilateral agreements with the European Union and the new law on foreign nationals of "third countries", which is still at the drafting stage, have entered into force.

### C. The prohibition of discrimination and its application to relations between individuals (art. 2 (1) (c) and (d))

86. On the question of the prohibition of discrimination and the possibility of a horizontal effect between individuals, reference should be made primarily to Switzerland's initial report (paras. 57 et seq.). According to traditional case law and legal doctrine, the prohibition of discrimination, as defined in NFC article 8, cannot in principle have a horizontal effect on relations between individuals, except in certain special cases.[124] Already in its message of 2 March 1992 on Switzerland's accession to the Convention, the Federal Council had stated that it was hardly feasible to take further legislative measures over and above the addition to the Criminal Code aimed at implementing the obligation actively to combat discriminatory behaviour on the part of individuals, as set out in article 2 (1).[125]

87. Admittedly, recent studies on Swiss law and the case law of the Federal Court recognize the indirect horizontal effect of the individual freedoms laid down in the Federal Constitution.[126] Legal writings increasingly consider that persons who behave in a discriminatory manner or make utterances of a discriminatory nature in private contractual relations may and must be denied the protection of the courts.[127] Concerning the contractual right to work, it should be noted in particular that dismissal is regarded as wrongful, and is thus subject to an obligation to pay compensation, when it is imposed by a party "for a reason inherent in the personality of the other party" (CO, art. 336 (1) (a)).[128] The same idea applies to leases: an owner may not refuse, "on grounds of vague apprehensions, antipathy or a negative attitude in principle towards a certain category of persons", someone proposed to him as a replacement by a tenant who terminates his lease early (see ATF, 119, II, 36 et seq.; 117, II, 156, 157 and 159). The Federal Court has ruled that asylum-seekers, for example, were entirely suitable replacement tenants and that owners did not have the right to refuse them merely on account of their status.[129]

88. It must nonetheless be pointed out that, with a few exceptions, Swiss private law does not recognize a general obligation to enter into a contract. In their private contractual relations, so long as no criminal offence is committed, individuals may conclude employment contracts or leases, for example, with parties of their choosing.

### D. Encouragement of integrationist organizations and movements (art. 2 (1) (e))

89. This issue will be dealt with later in the section on article 7 of the Convention (positive measures to combat racist behaviour) (see sect. VI below).

## II. CONDEMNATION OF APARTHEID (ART. 3)

90. Switzerland condemned the apartheid regime in South Africa at an early stage. As explained in the initial report (paras. 61 et seq.), between 1986 and the spring of 1994 Switzerland contributed 50 million francs to a "programme of positive measures" aimed at putting an end to apartheid and contributing to the development of a democratic regime. Following the democratic elections in April 1994, Switzerland decided to support South Africa's process of transition to a democratic society with a special programme having an initial duration of five years (1994-1999). Concerning cooperation for development, the Agency for Development and Cooperation (DDC), within the Federal Department of Foreign Affairs (DFAE), released 60 million francs; the DFAE earmarked another 20 million francs for measures to promote peace and democracy. In summer 1998, it was decided to extend this programme for five years, until 2004.

91. Switzerland and South Africa now enjoy very good relations, which have intensified in recent years.[130] Since the free general elections of 1994 and 1999, democracy in South Africa has been consolidated. The Government of President Mandela made national reconciliation and reunification of the deeply divided society a top priority. To be sure, it will take some time to overcome decades of apartheid. With its special programme of cooperation for development, the DDC is making an important contribution to reducing inequalities between rich and poor, as well as stabilizing and strengthening South African democracy. The main focus of cooperation is on agrarian reform (supporting the right to become landowners of persons who did not have land until now; assisting rural communities; improving legislation; furnishing information on how to become a landowner and obtain restitution of land), basic education (improving training to help achieve equal opportunity on the labour market; developing primary schools; providing for a system of scholarships; offering literacy and training programmes for adults), and democratization and civil society (promoting and enhancing a culture of democracy, understanding and respect for human rights; strengthening the rights of underprivileged groups). Even before 1994, the DDC had supported non-governmental organizations in South Africa working for a democratic society based on the principle of equality. The special DDC programme currently under way, to last until the end of 2004, should help to ensure that the transition to the "post-apartheid" period takes place with as little social tension and violence as possible.

92. The DFAE is also directing a programme of measures to promote peace. In the context of measures to promote peace and democracy, Switzerland has supported South Africa's Truth and Reconciliation Commission with several financial contributions; this Commission is making an important contribution to national reconciliation through its investigations and its analysis of the past. For about a year, two experts were delegated to serve as international examining judges. In February 1997, Switzerland committed itself contractually with the Truth and Reconciliation Commission and was thus the first country to make available a sum of

500,000 francs to victims of apartheid. The first half of that sum was paid immediately, in March 1997. In addition, it should be pointed out that since 1995 the State Secretariat for Economic Affairs (SECO)[131] has contributed 12 million francs to promoting the private sector, in particular small- and medium-sized undertakings within disadvantaged population groups.

93. All told, in 1998 Switzerland's development assistance - taking into account contributions to various mutual aid associations - totalled 17.7 million francs. This has focused primarily on Eastern Cape Province, one of the country's poorest.

| | 1997 (millions of francs) | 1998 (millions of francs) | 1999 (millions of francs) |
|---|---|---|---|
| DDC programme (without contributions to mutual aid associations) | 12.8 | 11.5 | 7.5 |
| DFAE (DP III) programme to promote peace | 4.1 | 3.8 | 4.4 |
| OFAEE (SECO) | 2.5 | 1.0 | 1.7 |
| Total public works (cooperation for development) | 19.4 | 16.3 | 13.6 |

## III. MEASURES TO MAKE CERTAIN ACTS OF RACIAL DISCRIMINATION PUNISHABLE BY LAW (ART. 4)

### A. Provisions of article 261 bis of the Criminal Code and article 171 (c) of the Military Criminal Code (art. 4 (a))

#### 1. General information

94. Article 4 (a) of the Convention requires States parties to declare punishable by law all dissemination of ideas based on racial superiority or hatred and incitement of racial discrimination. Switzerland has complied with its obligation by adopting the provisions of article 261 bis (1) to (3) of the Criminal Code[132] and article 171 (c) of the Military Criminal Code,[133] whose content is identical. These provisions, which were the subject of a referendum,[134] were approved on 25 September 1994 by 54.7 per cent of votes cast.[135] In the course of the campaign leading up to the vote, the opponents mainly cited the freedoms of expression and information.

95. Following approval of the provisions, Parliament considered on a number of occasions the tensions that may exist between the application and interpretation of article 261 bis of the Criminal Code and freedom of opinion. On 3 March 1999, the National Council, following the proposal of the Federal Council, rejected the Gusset motion of 19 June 1997 (CN 97.3327).[136] Then, in a motion entered on 21 April 1999,[137] a number of right-wing parliamentarians called on the Federal Council to abrogate the anti-discrimination law on the grounds that it was in conflict with article 16 of the new Constitution (freedoms of opinion and information); lastly, in December 1999, there was a call for the disbandment of the Federal Commission against Racism

(CFR).[138] In its policy statement of 18 August 1999 on the Scherrer motion, the Federal Council found that neither the old law nor the new Constitution guaranteed unrestricted freedom of opinion. Moreover, it is possible, under the criminal proceedings of most cantons, to require the complainant to bear the costs of the proceedings and to reimburse the expenses of the accused if, intentionally or as a result of serious negligence, he has lodged a complaint for violation of article 261 bis against an innocent person. The Federal Council focused in particular on the following points:

> "2. Freedom of opinion ensures everyone the right to express themselves freely in any way on any subject. The right to freedom of opinion is not only a necessary condition for communication between persons, but is also essential for the functioning of a democratic community. In view of the great importance of freedom of opinion, the area protected by this right is defined very broadly by the case law of the Federal Court and the European Court of Human Rights (...).
>
> "3. However, neither current law nor the new Constitution guarantees freedom of opinion without reservation. As noted in the Federal Council's opinion of 17 September 1997 on the Gusset motion concerning the revision of the criminal provision on racial discrimination, protection against discrimination has priority over freedom of opinion whenever an opinion expressed violates human dignity. In accordance with the case law of the Federal Court and the European Court of Human Rights and pursuant also to article 36 of the new Constitution, restrictions may be placed on freedom of opinion when the opinion expressed has a racist content. Such restrictions must be legally founded, must be in the public interest and must respect the principle of proportionality. In this connection, in its opinion on the Gusset motion, the Federal Council stated that, in most cases of application, the criminal provision prohibiting racial discrimination was in a situation of conflict with freedom of opinion. However, this does not mean that such situations of conflict must give rise to a disproportionate restriction of freedom of opinion (...). But neither does (the new Constitution) provide a permit for any expression of racist opinion."

96. Other political groups have also focused on this question and, on 27 and 28 March 1997, the working group known as "Junge Panther Schweiz JPS" submitted a popular initiative for preliminary examination to the Federal Chancellery. The objective of the initiative, entitled "For freedom of speech and the simultaneous lifting of the prohibition of racism",[139] was to abrogate the criminal provision combating racism. The collection of signatures began on 12 May 1998.[140] But the initiative, launched in the form of a clumsily drafted text, failed at an early stage, the initiative committee having been unable to collect the number of signatures needed before expiry of the deadline, 12 November 1999.[141]

97. Experience has shown that almost every new criminal provision initially has enforcement difficulties; the provision combating racial discrimination is no different. According to a survey on the subject of anti-Semitism commissioned by two Jewish organizations with the polling institute GfS, whose findings were published in March 2000,[142] 69 per cent of Swiss people now approve the provision, whereas 15 per cent disapprove. It should also be noted that the decisions of the cantonal courts and the Federal Court have become increasingly firm (see paras. 104 et seq. below).

## 2. Legal foundation

98. Article 261 bis of the Criminal Code states:

"Anyone who:

Publicly incites hatred or discrimination against a person or group of persons on account of their racial, ethnic or religious affiliation;

Publicly propagates an ideology aimed at systematically debasing or denigrating members of a particular race, ethnic group or religion;

With the same aim, organizes or encourages propaganda activities or takes part in them;

By means of utterances, writings, images, gestures or acts or in any other way, debases or discriminates against, in a manner that violates human dignity, a person or group of persons on account of their race, ethnic origin or religion or, for the same reason, denies, grossly minimizes or attempts to justify genocide or other crimes against humanity;

Refuses to provide a public service to a person or group of persons on account of their racial, ethnic or religious affiliation;

Shall be liable to imprisonment or a fine."

99. Such persons are automatically prosecuted and liable to imprisonment (from three days to three years) or a fine of up to 40,000 francs. Article 171 (c) of the Military Criminal Code is of the same tenor, but also adds the possibility of imposing a purely disciplinary sanction in "non-serious" cases.

100. The content of the criminal provision may be summarized as follows:

(a) Ban on publicly inciting hatred against a person or group of persons on account of their race and on organizing propaganda activities (CP, art. 261 bis (1) to (3));

(b) Ban on denying, grossly minimizing or attempting to justify genocide or other crimes against humanity (art. 261 bis (4));

(c) Ban on refusing to provide a public service to a person or group of persons on account of their racial, ethnic or religious affiliation (art. 261 bis (5)).

101. Some aspects, and indeed certain problems, are common to the various offences provided for in article 261 bis. This is the case, for example, with the question of legally protected interest, the application of the provision restricted to acts committed in public and the group of persons protected by this provision. Discussion had focused primarily on the first question, there being little uncertainty about the other two from the point of view of either legal writings or enforcement (see paras. 104 et seq. below). The points on which case law and legal writings are, on the whole, in agreement are summarized below.[143]

102. In a decision handed down on 5 December 1997 (see para. 109 below), the Federal Court clarified the question of the legally protected interest and found that article 261 bis protected not only public order, but also the dignity of the individual.[144] Essential here is that public order is protected only indirectly, as a consequence of the protection accorded to human dignity. Article 261 bis protects the dignity of the individual as a member of a particular race, ethnic group or religious community, this being unambiguously expressed in paragraph 4, but also, in substance, in paragraphs 1 to 3. It should be pointed out that Swiss legislation goes beyond the requirements under the Convention by expressly including, as punishable acts, discrimination for religious reasons and refusal to provide a public service. The provision protects not only groups of persons, as the Convention requires, but also individuals.

103. The groups referred to in the legislation must stand out in that they view themselves as members of a community that differs from the rest of the population in certain respects, particularly tradition, language and destiny, but also moral values and behavioural norms. Conversely, the population must view the community in the same way and, in the case of racial origin, for example, it must also think of it as having particular hereditary traits. To form a group within the meaning of the law, therefore, it is not sufficient to be of the same nationality, unless such nationality corresponds to a particular ethnic group or race, or at any rate the population so perceives it.

### 3. Case law of the courts in the enforcement of criminal provisions

#### (a) Cantonal case law

104. Since the entry into force on 1 January 1995 of the anti-discrimination law, some 300 judgements have been handed down (including suspended proceedings).[145] Every year, 100 or so cases are submitted for a legal opinion. During the period covered by this report, well-established cantonal case law has emerged, based on closely argued legal writings.[146]

105. Classifying judgements rendered to date is no simple matter, because the facts on which they are based are very different and few cases have a common denominator. But one category which can be clearly identified and is also the one in which the most convictions have been imposed is that of acts of an anti-Semitic nature. There have been convictions, inter alia, for letters to newspaper editors,[147] for remarks made in a circular from a religious group (see para. 109 below) and for a carnival satire, but also for other acts of an anti-Semitic nature (gestures or utterances).[148] However, it is above all written material which denies, minimizes or attempts to justify the Holocaust,[149] and also material citing notorious anti-Semitic statements that have resulted in a large number of judgements.[150]

106. Whereas a common denominator for the above-mentioned judgements can be found, it is, on the other hand, difficult to classify the remaining acts on which judgements have been handed down. For example, there have been convictions for racial discrimination against particular groups of persons, but the acts have been too varied to be categorized as fulfilling, or not fulfilling, the conditions set out in article 261 bis. These include acts of "graffitists",[151] threats of physical violence[152] and grossly rude remarks and insults.[153] Decisions to the effect that article 261 bis was not applicable do not provide a particularly significant picture either,

especially since it is not always clear whether criminal proceedings were suspended for want of firm evidence or because the authorities taking the decision thought that conditions constituting an offence had not been fulfilled. It can, however, be said that the applicability of article 261 bis has often been ruled out simply because the criterion of a public act had not been met, especially in cases of altercations without witnesses. It should also be mentioned that, in 1999, a conviction was handed down for the first time for refusal to provide a public service.

107. A number of cases relating to court proceedings concerning the anti-discrimination law have attracted considerable attention in the media and among the general public, which also helps to deter such acts. One of the most spectacular involved the prosecution of a well-known Holocaust revisionist:[154] in April 1996, the Procurator-General brought an indictment before the Baden district court (canton of Aargau) for racial discrimination and, in July 1998, the accused was sentenced to 15 months' non-suspended imprisonment and a fine of 8,000 francs, as well as payment of 1,000 francs to a plaintiff who had instituted civil proceedings against him for abuse; 10,000 francs from the sale of revisionist books were also seized. The Supreme Court of the canton of Aargau upheld the judgement in June 1999, whereupon the accused lodged a further appeal with the Federal Court. On 22 March 2000, the Federal Court rejected this appeal as ill-founded and upheld the sentence.[155]

108. The cantonal authorities are required by article 1 (16) of the Ordinance on communication of 28 November 1994 (RS 312.3) to communicate to the public prosecutor's office all judgements, administrative decisions and dismissal orders relating to article 261 bis. The prosecutor's office makes the copies of these judgements available to the Federal Commission against Racism, among others.[156]

**(b) Case law of the Federal Court**

109. On 5 December 1997, the Federal Court handed down its first decision in pursuance of the new criminal provision: rendering an opinion on Criminal Code article 261 bis (1) and (4) in decision ATF, 123, IV, 202, the Court found that the provision protected the dignity of the individual as a member of a particular race, ethnic group or religion. It is thus an offence for anyone to discriminate against a person on grounds of his presumed race, ethnic origin or religion, regardless of whether or not he is actually so affiliated (preambular para. 3 (a)). The notion of "inciting hatred" also includes stirring up or arousing such sentiments (preambular para. 3 (b)). Anything that is intended for a large group of persons is regarded as public (preambular para. 3 (d)). At a subjective level, the offence presupposes intentional behaviour dictated by motives of racial discrimination (preambular para. 4 (c)). The case concerned the sending of a large number of letters containing anti-Semitic remarks. The Federal Court upheld the sentence of four months' unsuspended imprisonment and the fine of 5,000 francs imposed on the appellant.

110. In decision ATF, 124, IV, 21, rendered on 30 April 1998, the Federal Court upheld the confiscation of brochures and compact discs with a racist content. It ruled that racist literature could be confiscated and destroyed, even in the absence of a punishable act. It thus upheld a decision by the Neuchâtel cantonal court ordering the destruction of 20 periodicals and 30 compact discs with a racist content, although their addressees had escaped conviction.

The Federal Court considered that a message - regardless of its form or medium - depicting the human dignity of members of a particular race, ethnic group or religion as being of lesser worth was covered by article 261 bis (1) (preambular para. 2 (b)).

111. The Federal Court found, in a decision of 10 August 1999, that the principle of liability in series could not be applied in cases of racial discrimination.[157] A person who distributes a book containing racist remarks cannot invoke liability in series as provided for in the criminal law on the press or shift all criminal responsibility onto the author.[158] This is the conclusion that can be drawn from the written statement of grounds for the decision of the Federal Court on the case of a Montreux bookshop owner who had distributed and sold the revisionist book "Les mythes fondateurs de la politique israélienne" by the Frenchman Roger Garaudy. When a legal provision specifically prohibits the publication of certain contents, to consider that the author of the piece is solely responsible would run counter to the purpose sought by the law. To take the example of the prohibition of the depiction of violence and hard-core pornography (CP, arts. 135 and 197), it would be shocking in such cases to treat leniently a person who distributed such material and only punish the manufacturer or importer. Pursuant to the above decision, the same applies to criminal offences involving racial discrimination. The purpose of the anti-discrimination law, notably to ban publications containing racist remarks, would be circumvented if a person who distributed such material could enjoy the privilege given by the criminal law on the press and responsibility were shifted onto the author alone.

112. In a decision of 3 November 1999, the Federal Court clarified its case law and found that article 261 bis (4) of the Criminal Code was also applicable to racist statements directed at third parties and not only at the minority directly concerned.[159] Pursuant to decision ATF, 124, IV, 121 (see para. 110 above), it was concluded that only the first three paragraphs of article 261 bis were applicable in cases of public discrimination vis-à-vis third parties. Although the case concerned had to do with the propagation of a feeling of hatred of blacks, the Federal Court then also had to rule on the negation of genocide (i.e. the extermination of the Jews under the Third Reich), referred to solely in paragraph 4 of article 261 bis. According to the decision of the Court of Criminal Cassation, such behaviour is also punishable when the utterances in question are made in the presence of third parties and not only in the presence of Jews.

113. The Court of Criminal Cassation of the Federal Court annulled the conviction of a newspaper editor who had been sentenced to three months' suspended imprisonment by the Basel court of appeal for several acts of racial discrimination. The Federal Court accepted, on a small number of points, the editor's public-law appeal and his appeal on points of law, but upheld the conviction for racial discrimination and referred the case back to the cantonal court of appeal for a new judgement. The Federal Court annulled the conviction, primarily for procedural reasons, finding that the Prosecutor-General had not allowed the accused sufficient time to prepare his defence.[160] The Federal Court partly upheld the appeal on points of law, ruling, contrary to the lower court, that two expressions used in the text in question were not relevant from a criminal point of view. The first concerned the words "Holocaust-Hysterie" (Holocaust hysteria), which, in the view of the Federal Court, do not refer to the Holocaust as such, but to the way in which the subject is currently discussed. According to the Federal Court, this "out-of-place" expression, taken in context, does not mean that the crimes against the Jews were actually much less serious than generally assumed, from the point of view of both their extent and their nature; instead, the expression takes issue with the manner in which the

Holocaust is currently discussed, in particular the amount and nature of information provided by the media. The second phrase was a reference to the "Gaskammer- und Umerziehungsgeist" (obsession with the gas chambers and re-education). The criticism expressed here concerns the efforts made to remind today's youth of the events of the past and Switzerland's role therein. The Federal Court considered that the phrase was "in poor taste", although it could not be assimilated to gross minimization of the Holocaust within the meaning of article 261 bis. Nor did texts which attacked the "Holocaust-Hysterie" and the "Gaskammer- und Umerziehungsgeist" amount to denigration of the Jews, an offence which is punishable by law. When interpreting the law in the light of freedom of expression and opinion, as required by the Constitution, only truly repugnant utterances reflecting real contempt for the human person may constitute the offence of racism.

114. Lastly, on 22 March 2000, the Federal Court upheld a sentence of 15 months' unsuspended imprisonment imposed on a well-known revisionist by the Baden district court (canton of Aargau) and confirmed by the Aargau Supreme Court.[161] The accused was the author of several books and newspaper articles denying the planned mass extermination of millions of Jews, and in particular the fact that gas chambers had been built for that purpose. After the Baden district court had convicted him, in July 1998, on several charges of racial discrimination and abuse, and sentenced him to 15 months' unsuspended imprisonment and a fine of 8,000 francs, he appealed the judgement. In the Federal Court, he argued that in none of his publications had he questioned the Holocaust as such, but had simply contested the use of gas and gas chambers, and challenged "the figure of several million victims" habitually cited. The Federal Court considered this argument to be "pure hypocrisy" and of "pseudo-scientific appearance". To contest the gas chambers in itself constituted gross minimization of the Holocaust; according to widely-published estimates based on a wealth of evidence, about 6 million Jews were murdered, including a large number who were gassed. In claiming that only several hundred thousand Jews had been murdered, the accused was denying or grossly minimizing one of the most horrifying crimes in the history of mankind. For the Federal Court, the objection that the accused was convinced of the accuracy of his information as a result of his work and research and that he therefore could not be accused of having expressed his views in bad faith was unfounded. As it explained in its decision, in criminal law the notion of "denial" does not imply that a person is acting in bad faith. It is sufficient for the accused to have based his argument on inaccurate grounds and to have acted recklessly. The Federal Court considered that the theory espoused by the accused of a Jewish conspiracy against the Christian West was an ideology aimed at systematically debasing and denigrating the Jews (CP, art. 261 bis (2)).

**(c) Assessment**

115. It can be seen that the provisions of article 261 bis can be applied consistently and judiciously. Contrary to fears expressed prior to its adoption that it was too imprecise and left the enforcement authorities a latitude for evaluation, which is incompatible with the principle of determination in criminal law,[162] its enforcement is not posing any particular difficulties. It may be concluded that the implementation of the anti-discrimination provision is effective and poses no particular difficulty, and that a clear body of legal opinion is emerging on the subject.

### B. Prohibition of organizations and propaganda activities of a racist character, and Switzerland's reservation (art. 4 (b))

116. It follows from the case law of the Federal Court that the authorities must call for the disbanding of an organization with legal personality when it pursues an illegal goal. But account must also be taken of the fundamental right of freedom of association (NFC, art. 23), which is why merely joining an organization does not in itself constitute a punishable act. As to the reasons for Switzerland's decision to express a reservation on article 4 of the Convention, reference is made to paragraph 68 of the initial report.

117. However, pursuant to article 260 ter of the Criminal Code (see paras. 312 et seq. below), participating in or supporting an organization whose constitution and composition are secret and whose goal is apparently to commit acts of criminal violence of a discriminatory nature is punishable.[163] The organization does not need to have a legal existence; it is sufficient for it to exist in fact and to have a stable structure, that is to say, to have objectively ascertainable planned and systematic activities that manifest the danger it represents. Although the organization's goal must not be exclusively to commit crimes (within the meaning of CP art. 9 (1)), it must be so in substance. If its goal is not to perpetrate acts of violence, it is the tendency to secure for itself economic advantages by criminal means that must constitute its main objective. A person is deemed to take part in the organization if he joins it, engages in an activity related to the organization's criminal goal and consents to its objectives, unless he holds a leadership position.

### C. Obligation on the authorities to prohibit racial discrimination (art. 4 (c))

118. Pursuant to article 4 (c) of the Convention, the States parties commit themselves to requiring all authorities to prohibit racial discrimination. It is generally recognized that the prohibition of discrimination expressly codified in article 8 of the Federal Constitution concerns all public authorities, regardless of their level within the State. Reference may also be made to article 9 of the Constitution, which reads:

> "Article 9. Protection against arbitrariness and protection of good faith
>
> Everyone has the right to be treated by the State institutions without arbitrariness and in conformity with the rules of good faith."

119. In its policy statement concerning the report on anti-Semitism in Switzerland submitted in autumn 1998 by the Federal Commission for Refugees and containing recommendations for preventive measures in the areas of politics, the authorities and the administration, the Federal Council stated that it would pursue with determination its fight against all forms of racism, discrimination and anti-Semitism and that it would do everything in its power to put the Commission's recommendations into effect.

## IV. ELIMINATION OF RACIAL DISCRIMINATION, WITH PARTICULAR REFERENCE TO SPECIFIC HUMAN RIGHTS (ART. 5)

### A. Right to equal treatment before the tribunals and all other organs administering justice (art. 5 (a))

120. Articles 122 and 123 of the new Federal Constitution provide that the organization of the courts, judicial procedure and the administration of justice, in civil and criminal law, are cantonal matters, as in the past. Federal legislation governs only the procedure in federal bodies. However, the Federal Court's case law on fundamental rights in procedural matters has established a set of principles that the cantons must observe. Thus, the Federal Court ensures that the cantonal authorities observe the principles set forth in article 8 (equality before the law and all the procedural rights resulting therefrom) and article 30 (right to be tried by a court established by law) of the Federal Constitution, together with those in articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights.[164]

121. The following provisions of the revised Federal Constitution reflect the Federal Court's case law on procedural safeguards in judicial and administrative bodies, which has already been presented in the initial report (right to equal and fair treatment, right to be tried within a reasonable period, right to be heard and right to free legal assistance):

"Article 29. General procedural guarantees

1. Every person has the right in legal or administrative proceedings to have their case treated fairly and brought to court within a reasonable time.

2. The parties have the right to be heard.

3. Every person lacking the necessary means has the right to free legal assistance, unless their case appears to have no chance of success. The person also has the right to free legal representation, insofar as this is necessary to protect their rights.

"Article 30. Guarantees in judicial procedure

1. Every person whose case is to be heard in a judicial procedure has the right to have their case tried in a competent, independent and impartial court established by law. Exceptional tribunals are prohibited.

2. A person against whom a civil action is brought has the right to have their case heard before the court at the person's domicile. The law may provide for another jurisdiction.

3. The court hearing shall be held and the judgement read in public. Legislation may provide for exceptions.

...

"Article 32. Criminal procedure

1. Every person shall be presumed innocent until convicted under the law.

2. Every accused person has the right to be informed as soon as possible and in full detail of the accusations against them. The person must have the opportunity to exercise their rights of defence.

3. Every convicted person has the right to have the judgement reviewed by a higher court. The cases where the Federal Court sits as a court of sole instance are reserved."

122. Article 9 of the new Federal Constitution guarantees protection against arbitrariness and protection of good faith vis-à-vis State institutions. Moreover, the Federal Court, through its case law, has consistently protected procedural rights such as the prohibition of denial of justice and excessive adherence to form, the right to be heard, and the principles of legality and proportionality.

123. Article 30 (1) of the new Federal Constitution (OFC, art. 58) guarantees that no one shall be tried by an ad hoc or ad personam court and that, on the contrary, judicial procedure shall be governed by general, abstract rules. Article 30 (1) thus presupposes, as did article 58 of the old Constitution, the existence of a system of jurisdiction regulated by law and is addressed primarily to the cantonal legislature responsible for setting up a judicial institution. As has already been mentioned, the organization of the courts and judicial procedure is a cantonal matter, in both civil and criminal matters.

124. The legislation in force is about to be radically changed as part of the judicial reform now under way. This reform is the first in a series of institutional reforms through which the Federal Council intends to modify the revised Constitution, which entered into force on 1 January 2000, and it makes some significant improvements. The three main thrusts of the judicial reform are as follows:

(a) Reduced workload for the Federal Court: it is intended to increase the capacity of lower courts, so that the supreme court can limit itself to monitoring the application of the law and so as to reduce the number of cases referred directly to it (although there are not large numbers of these, they do take up a considerable amount of time);

(b) Procedural standardization: the judicial reform gives the Confederation the power to standardize civil and criminal procedure for the whole country, whereas at the moment it is still determined by the cantons and is different in each canton;

(c) Enhanced protection of the rights of the person on trial: the Constitution will contain a new general guarantee of access to justice, which will establish the right to be tried by an independent court. Moreover, the judicial reform will simplify the current, complicated system of appeal, so that the person on trial will be better placed to defend his procedural rights.

125. The standardization of the current 27 codes of civil procedure and 29 codes of criminal procedure - which is also considered necessary by the cantons - is one of the central planks of the judicial reform. In this area, the differences between codes have led to some grey areas in the law and to inequalities in treatment and have hampered the fight against crime. The judicial reform is therefore intended to take away from the cantons the power to decide for themselves on the organization of the courts and to standardize procedure. The preparatory work described below suggests that these goals may be attained quickly.

### 1. "From 29 to unity"

126. "From 29 to unity" is the title of a blueprint for a standardized federal code of criminal procedure, prepared by a commission of experts and submitted by the Federal Department of Justice and Police in December 1997. The commission's report outlines the basic features of a future code of criminal procedure applicable throughout Switzerland, sets out the consequences which the adoption of such a code would entail for the organization of the courts in the cantons and comments on the fundamental legal questions which must be answered. There were lively discussions with the main parties concerned at public hearings and briefings held in 1998. Once the judicial reform has been adopted, a draft federal code of criminal procedure is expected to be ready by spring 2001.

127. The draft standardized code of civil procedure should have been prepared by the relevant expert commission by the summer of 2001.

### 2. Draft amendments to the Swiss Criminal Code, the Federal Act concerning Criminal Procedure and the Federal Act concerning Administrative Criminal Law

128. The draft is made up of several parts, all of which aim to improve and increase the efficiency of criminal proceedings while strengthening the rule of law in this area. These measures have been developed mainly in response to the emergence of new forms of criminality, particularly organized crime, money laundering and certain types of economic crime. To improve the efficiency of proceedings in these areas, new powers will be transferred to the Confederation. In cases involving organized crime, for example, the Federal Public Prosecutor's Office should be able to institute investigation proceedings in lieu of the cantons, which will mean that police investigations at the federal level will become more important. It is therefore important to strengthen the rights of the accused and their counsel at this stage of the proceedings; these rights are still partly restricted at the moment. The changes should improve, in particular, the rules governing arrest and the participation of the accused and their counsel in the judicial investigation.[165]

### 3. Introduction of a new federal act on mail and telecommunications surveillance and a federal act on secret inquiries

129. Independently of Parliament's work on the standardization of criminal procedure in Switzerland, the Federal Council, in its 1 July 1998 message to Parliament concerning the federal acts on mail and telecommunications surveillance and on secret inquiries, proposed the

adoption of standardized rules for both of these sensitive areas.[166] These bills take account of the case law of the European Court of Human Rights, which has established that there must be a legal basis covering these areas and requires that a trial be fair and just.[167]

#### 4. Federal bill concerning the freedom of movement of lawyers

130. There are two aspects to this bill: on the one hand, it should enable lawyers to move around freely, by developing the cantonal lawyers' registers, and, on the other, it should standardize certain requirements for practising the legal profession as regards professional rules, disciplinary measures and fees. After the initial consultations on the bill were concluded on 31 August 1997, the relevant provisions of Community law were added to it, in line with the sectoral agreements between Switzerland and the European Union. The bill was therefore sent back for consultations, which lasted until 13 April 1999, so that it could be adapted as required by the sectoral agreement between Switzerland and the European Union on the freedom of movement of persons. With these changes, freedom of movement will, in theory, also be guaranteed for lawyers from the European Union.

### B. Right to security and protection by the State (art. 5 (b))

#### 1. Liberty and security of person

131. The right to protection of personal liberty, and particularly of physical and mental integrity, was previously an unwritten constitutional right, but is now expressly guaranteed by article 10 (2) of the Federal Constitution, which reads: "Every person has the right to personal liberty, particularly to physical and mental integrity and to freedom of movement."

132. Switzerland submitted its third periodic report to the Committee against Torture on 14 November 1997 (CAT/C/34/Add.6; see also CAT/C/SR.307 and SR.308). In its conclusions (A/53/44, paras. 80-100), the Committee noted that no governmental or non-governmental body had reported any cases of torture. The Committee also noted the amendments made to a number of provisions of the cantonal codes of criminal procedure with the aim of strengthening the rights of defence and the rights of persons in pre-trial detention.

133. Furthermore, article 31 of the Federal Constitution contains the following provisions on the deprivation of liberty:

> "Article 31. Deprivation of liberty
>
> 1. No person may be deprived of liberty except in the cases and in the forms provided by statute.
>
> 2. All persons deprived of their liberty have the right to be informed immediately, in a language that they understand, of the reasons for their detention and of their rights. They must have the opportunity to exercise their rights. In particular, they have the right to have their relatives informed.

3. Every person taken into pre-trial detention has the right to be brought before a judge without delay; the judge shall decide whether the person is to remain in detention or be released. Every person in pre-trial detention has the right to be tried within a reasonable time.

4. All persons who are deprived of their liberty without a trial have the right to submit their case to a court at any time. The court shall decide as soon as possible whether the detention is legal."

134. Attention is also drawn in this context to the draft report on the standardization of the codes of criminal procedure, which has been prepared by an expert commission. The draft envisages removing jurisdiction in criminal procedure from the cantons. On 23 February 1998, the commission published a report outlining the basic features of a future code of criminal procedure applicable throughout Switzerland.[168]

135. It should also be recalled that the Federal Court has handed down several judgements concerning extradition and judicial assistance. It has thereby confirmed that, when Switzerland provides judicial assistance or agrees to an extradition request, it must ensure that the proceedings in which it is cooperating provide the persons prosecuted with minimum guarantees in line with those which exist in democratic States and, in particular, those defined in the ECHR and the second Covenant (see Federal Act concerning International Mutual Assistance in Criminal Matters, art. 2).[169]

### 2. Right to protection by the State

136. The cantons have primary responsibility for ensuring the maintenance of public order and security. In addition to the matters protected by common police regulations, such as property and public morals, the rights to life and to physical and moral integrity are protected by the cantonal police forces. In accordance with the principle of equality before the law (NFC, art. 8), the authorities must ensure that every person enjoys the same protection, regardless of their race, ethnic origin, language or religious beliefs.

137. At the end of its second periodic visit to Switzerland from 11 to 23 February 1996, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment noted in its report to the Federal Council that there were certain shortcomings in areas governed by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the second Covenant. The Human Rights Committee also expressed concern on these issues in its concluding observations (CCPR/C/79/Add.70, para. 13) on Switzerland's initial report (CCPR/C/81/Add.8). These issues will be dealt with in the Part Three of this report, where the accusations of ill-treatment levelled at the police will be examined (paras. 281 et seq.).

## C. Political rights (art. 5 (c))

### 1. Right to vote and stand for election on the basis of a system of universal and equal suffrage

#### (a) Constitutional basis

138. Article 34 of the Federal Constitution guarantees political rights as fundamental constitutional rights, as follows:

"Article 34. Political rights

1. Political rights are guaranteed.

2. The guarantee of political rights protects the free formation of opinion by citizens and the faithful and reliable expression of their will."

#### (b) Right to vote

139. At the federal level, the right to vote is guaranteed by article 136, in conjunction with article 39, of the Federal Constitution:

"Article 136. Political rights

1. All Swiss citizens aged 18 years or over who have not been deprived of legal capacity for reasons of mental illness or feeble-mindedness have political rights in federal matters. All have the same political rights and duties.

2. They may participate in elections to the National Council and in federal votes, and may launch and sign people's initiatives and calls for referendums in federal matters."

"Article 39. Exercise of political rights

1. The Confederation regulates the exercise of political rights at the federal level, and the cantons regulate the exercise of these rights at the cantonal and communal levels.

2. Political rights are exercised at the place of domicile. The Confederation and the cantons may provide for exceptions.

3. No one may exercise their political rights in more than one canton.

..."

140. The implementation of these principles is regulated in detail in the Federal Act concerning Political Rights (LDP) of 17 December 1976,[170] the Federal Act concerning the Political Rights of Swiss Citizens Living Abroad of 19 December 1975[171] and their

implementing regulations. Equality of political rights and duties is a fundamental right, for the violation of which remedies exist (LDP, arts. 77 and 80). Neither the Constitution nor federal legislation provides for any specific obligations in this area.

141. Article 136 of the Federal Constitution mentions the three requirements for exercising the right to vote:

(a) Swiss nationality. This requirement excludes foreigners resident in Switzerland from the right to vote. Under article 39 (1) of the Constitution, cantons may grant foreigners the right to take part in decisions at the cantonal or communal level;[172]

(b) Age of civic majority. This is set at 18 years. The cantons have set the same age limit;

(c) Right to active citizenship. This is governed by LDP article 2, under which citizens deprived of legal capacity for reasons of mental illness or feeble-mindedness (see CC, art. 369) are deprived of the right to vote at the federal level. Deprivation of this right presupposes a declaration of legal incapacity or, in other words, the imposition of a guardianship order for one of the reasons exhaustively described in article 369 of the Civil Code.[173]

142. Paragraph 93 of the initial report mentioned that two cantons invoked grounds other than mental illness or feeble-mindedness for the deprivation of political rights, but since then those cantons (Schwyz and St. Gallen) have revoked these provisions.

**(c) Eligibility for election**

143. At the federal level, every citizen who has the right to vote is eligible for election to the National Council, the Federal Council and the Federal Court (NFC, art. 143). Article 144 of the Constitution stipulates that members of the National Council, members of the Council of States, members of the Federal Council and Federal Court judges may not belong to two of these bodies at the same time. Members of the Federal Council and full-time Federal Court judges may not exercise any other function on behalf of the Confederation or a canton and may not engage in any other paid activity. Moreover, the law may lay down other similar restrictions. The rule specifically reserving eligibility to lay citizens has been excluded from the revised Constitution.[174]

**(d) Political rights of foreigners in Switzerland**

144. By way of introduction, it should be recalled that international public law does not recognize a general right of the foreign population to take part in political decisions on an equal footing. In Switzerland, at the federal level, foreigners have the right of petition (OFC, art. 57; NFC, art. 33). On 30 September 1996, the National Council, in a parliamentary motion, charged the Federal Council with the task of examining the possibility of giving the right to vote to all foreigners who have been resident in Switzerland for at least five years.

145. At the time of writing of the initial report, only the cantons of Neuchâtel (at the communal level)[175] and Jura (at the communal and cantonal levels) accorded foreigners the right to vote. In 1995, as part of the revision of its constitution, the canton of Appenzell Ausserrhoden, authorized communes to grant foreigners the right to vote; in January 2000, the commune of Wald (Appenzell Ausserrhoden) was therefore able to grant foreigners the right to vote, thereby becoming the first commune in German-speaking Switzerland to take such a decision.[176]

146. In the canton of Geneva, the government decided in 1998 to give fresh impetus to the drive for equality of political rights for foreigners, submitting to parliament an amendment to the cantonal constitution that would allow communes to grant foreigners the right to vote. In the canton of Jura, where foreigners have the right to vote at both the cantonal and communal levels (except for votes on constitutional amendments), parliament decided in November 1998, on first reading, that in future foreigners would also be eligible to stand in elections to the general councils (communal parliaments).[177] In Delémont, the first of the three communes in Jura with a general council (the others being Bassecourt and Porrentruy) to take a decision, the general council adopted an amendment to the communal regulations, which was confirmed by popular vote on 21 May 2000.

147. In the cantons of Jura and Neuchâtel, foreigners not only have the right to vote but also the right to stand for election to communal commissions of experts. In the canton of Jura, they can be elected to rent tribunals. In Jura and Neuchâtel, they can also be elected to labour courts.

148. In addition, persons of foreign nationality are members of commissions and advisory bodies, which, with only one exception, come under public law and were set up by the authorities. Foreigners may be appointed to them by the authorities and take part in meetings in their capacity as official members. They may therefore express their opinions in these bodies on subjects of direct interest to them. Such bodies are found at all levels of government:

(a) Federal level: Federal Commission on Foreigners, Federal Commission against Racism;

(b) Cantonal level: Geneva, Jura, Neuchâtel, Thurgau and Vaud;

(c) Communal level: such bodies exist in about 20 communes.

149. In Lausanne, 13 of the 42 members of the Immigrants Advisory Board are of foreign origin; they are elected directly by foreign residents in a universal ballot and also sit on the Communal Commission on Foreigners, which meets 10 times a year, with 8 members of the communal legislature, and is chaired by a member of the communal executive. Foreign members of the Immigrants Advisory Board receive all the official documents circulated to members of the communal legislature.

150. At the federal level, a third of the members of the Federal Commission on Foreigners, which was set up by the Federal Council, are of foreign origin, whether or not they have acquired Swiss nationality. The Commission's task is to advise the Government on issues concerning the integration of people of foreign nationality in all areas of social life. It acts as an intermediary in

the dialogue between, on the one hand, the federal authorities and local services providing assistance to foreigners (of which there are around 70) and, on the other, federations of immigrant associations. In June 1998, an amendment to the Federal Act concerning the Permanent and Temporary Residence of Foreigners (LSEE) was adopted; it puts the Commission on a legal footing and allows the Confederation to give financial support for the integration of foreign nationals.[178]

151. Spanish, Italian and Portuguese nationals can elect representatives to "emigration committees" in direct elections by universal suffrage. The elections take place on the basis of consular districts. Election campaigns are traditionally held before these elections. The emigration committees have the specific task of representing emigrants at their consulate. The committees, in turn, elect from among their members delegates to represent emigrants vis-à-vis the authorities of their home country.

### 2. Right to equal access to public service

152. As far as eligibility for civil service posts is concerned, the Civil Service Statutes of 30 June 1927[179] contain a nationality clause which stipulates that "Any Swiss national of good morals may be appointed ... With the consent of the Federal Council, a person not of Swiss nationality may in exceptional cases be permitted to enter the civil service" (Statutes, art. 2). In spring 1998, the Federal Council opened consultations on the first draft of a new law on Confederation employees, designed to replace the Statutes. The main innovation of the new law would be the abolition of civil servant status. In future, persons employed by the Confederation would no longer be appointed for a four-year period, but would be hired on contracts which could be terminated under public law and which would be modelled largely on the Federal Code of Obligations. At the time of writing, the bill on Confederation employees was under discussion in Parliament, which has removed the nationality clause - the last point on which there was disagreement between the two houses. Originally, the Council of States wanted to make Swiss citizenship a legal condition for eligibility for high public office. It is now up to the Federal Council to settle this question in the implementing regulations.

## D. Other civil rights (art. 5 (d))

### 1. Right to freedom of movement and residence within the border of the State (art. 5 (d) (i))

153. In accordance with article 24 (1) of the Federal Constitution, all Swiss citizens have the right to establish their domicile anywhere in the country. This freedom of domicile applies only to Swiss nationals.

154. In Swiss law, the residence of foreign nationals is still subject to authorization and permits are valid only for the canton which issues them (LSEE, art. 8). The reader is referred to the explanations on this question in the initial report (paras. 104 et seq.). According to LSEE article 13 (e), the competent cantonal authority may enjoin a foreign national who has no permanent or temporary residence permit and who poses a threat to public security and order not to leave the territory to which he or she is assigned or not to enter a particular area.

155. In theory, persons of foreign nationality who hold a permanent residence permit can settle in any canton of their choosing, subject to the exceptions mentioned in LSEE article 9 (3), if they are a national of one of the many countries to have signed an establishment treaty with Switzerland. The right to establishment, which is practically the same as for Swiss citizens, is not written into the Constitution, but it is a right and it can be enforced by virtue of Switzerland's commitments under international treaties.

### 2. Right to leave any country, including one's own, and to return to one's country (art. 5 (d) (ii))

156. Article 24 (2) of the Federal Constitution establishes the right of Swiss nationals to leave and enter Switzerland. In addition, article 25 of the Constitution guarantees protection to Swiss citizens and foreign nationals against expulsion and forcible return ("refoulement").

> "Article 25. Protection against expulsion, extradition and forcible return
>
> 1. Swiss citizens may not be expelled from the country; they may be handed over to a foreign authority only with their consent.
>
> 2. Refugees may not be returned to the territory of a State in which they are persecuted or handed over to the authorities of such a State.
>
> 3. No one may be returned to the territory of a State where he or she is in danger of being subjected to torture or any other cruel or inhuman treatment or punishment."

157. Although it is forbidden to expel a Swiss citizen, his or her extradition on criminal grounds is still compatible with article 25 of the new Federal Constitution. However, the Constitution contains an important innovation in that the principle of non-refoulement, which had been taken into account by the Federal Court for some time in cases of both extradition[180] and forcible return,[181] is now explicitly recognized. This principle is also guaranteed by article 7 of the second Covenant, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ECHR article 3 and the Geneva Convention relating to the Status of Refugees, and is a peremptory norm of international law (jus cogens). According to this norm, no one may be handed over to a State where he or she would be in danger of being subjected to torture or any other inhuman or degrading treatment.

### 3. Right to nationality (art. 5 (d) (iii))

158. The present legislation on nationality does not provide for the right to acquire Swiss nationality, even for stateless persons. As already mentioned in paragraph 112 of the initial report, the Federal Act concerning the Acquisition and Loss of Swiss Nationality (LN) of 29 September 1952[182] provides for two ways of acquiring Swiss nationality: acquisition by operation of the law, particularly by filiation, and naturalization.[183] The naturalization of foreign nationals or stateless persons continues to depend on certain conditions of integration in the national community and length of residence in Switzerland.[184] However, the legal situation has changed with the entry into force of the new Constitution insofar as the latter requires the

Confederation to facilitate the naturalization of stateless children.[185] Article 38 (3) of the new Constitution stipulates that the Confederation "shall facilitate the naturalization of stateless children".

159. In this context, it should be pointed out that the Federal Council, in its report on the legislative programme for 1999-2003,[186] announced its intention to submit a new bill in order to make it easier for young foreigners born and raised in Switzerland to be naturalized. The first step in this direction will be to establish the constitutional basis to allow the nationality law to be amended.

160. Between 1991 and 1998, approximately 123,000 people were naturalized in Switzerland; the number of naturalizations rose from 8,757 in 1991 to 21,277 in 1998. Thus, thanks to the introduction of a simplified naturalization procedure for spouses of Swiss citizens and the possibility of having dual nationality, the annual number of naturalizations more than doubled between 1991 and 1998. In 1998, this number rose by 11 per cent as compared with the previous year. The acquisition of Swiss nationality is now the most important factor in the growth of the population of Swiss nationals.[187] However, the naturalization rate remained at the relatively modest level of 1.6 per cent, even in 1998.[188] Despite the current restrictions on naturalization, approximately 619,000 foreign nationals are today eligible to acquire Swiss nationality.[189] Many foreigners are probably deterred from seeking Swiss nationality because they are citizens of a member State of the European Union or because their State of origin prohibits them from holding dual nationality, or else because the requirements they must meet are sometimes high.

161. The table below gives an overview of naturalizations between 1991 and 1999, broken down according to the national origin of the persons naturalized.[190]

| Country of origin | 1991 | 1992[191] | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|---|---|---|---|
| Europe | 6 780 | 7 915 | 9 492 | 10 013 | 12 592 | 14 410 | 14 357 | 15 944 | 13 261 |
| EFTA countries | 36 | 29 | 17 | 19 | 20 | 29 | 29 | 32 | 20 |
| European Union countries | 5 003 | 5 388 | 6 046 | 6 116 | 7 429 | 8 480 | 8 232 | 9 267 | 8 467 |
| of which: Germany | 971 | 1 092 | 883 | 656 | 703 | 668 | 644 | 605 | 461 |
| France | 677 | 801 | 858 | 932 | 871 | 1 032 | 985 | 1 152 | 848 |
| Italy | 1 802 | 1 908 | 2 766 | 3 255 | 4 376 | 5 153 | 4 981 | 5 612 | 5 510 |
| Austria | 478 | 458 | 412 | 254 | 260 | 248 | 223 | 186 | 140 |
| Spain | 408 | 348 | 319 | 304 | 431 | 449 | 481 | 619 | 507 |
| United Kingdom | 135 | 307 | 347 | 263 | 278 | 294 | 269 | 285 | 228 |
| Former Yugoslavia | 607 | 932 | 1 454 | 1 820 | 2 493 | 2 784 | 2 956 | 3 310 | 1 578 |
| Czech Republic and Slovakia | 362 | 338 | 415 | 370 | 385 | 465 | 272 | 231 | 184 |
| Hungary | 186 | 222 | 207 | 243 | 298 | 276 | 206 | 187 | 153 |
| Turkey | 333 | 612 | 820 | 966 | 1 205 | 1 429 | 1 184 | 2 093 | 2 260 |
| Other European countries | 253 | 394 | 533 | 479 | 762 | 947 | 848 | 824 | 599 |

| Continent of origin | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|---|---|---|---|
| Africa | 304 | 893 | 876 | 887 | 919 | 1 198 | 1 339 | 1 466 | 1 339 |
| Americas | 691 | 863 | 879 | 805 | 1 007 | 995 | 1 086 | 1 463 | 1 247 |
| Asia | 961 | 1 422 | 1 614 | 1 998 | 2 226 | 2 478 | 2 338 | 2 363 | 2 121 |
| Australia, Oceania | 18 | 22 | 19 | 23 | 24 | 32 | 32 | 16 | 14 |
| Stateless | 3 | 18 | 18 | 13 | 22 | 46 | 17 | 25 | 16 |

162. Switzerland lags behind other European countries in naturalization matters. The proportion of foreign nationals who acquire the nationality of their country of residence is generally higher in the European Union as a whole and in most of its member countries than in Switzerland.[192] On average, it takes 12 years for a foreign national residing in Switzerland to obtain Swiss nationality. One of the reasons for this lengthy process is Switzerland's restrictive naturalization practice and, in particular, the fact that in many communes it is the citizens who decide on naturalization (in the communal assembly or through the ballot box).[193] Discussions are now taking place on an amendment to the law at the federal level. On 1 December 1999, in reply to a parliamentary question, the Federal Council announced that it was looking into the possibility of introducing a right of appeal in naturalization matters, particularly in cases where a popular ballot led to discriminatory or arbitrary decisions;[194] it again took a firm line on this subject in March 2000.[195] In addition, the Federal Council intends to submit, in the current parliament, a draft article for the Constitution which would make it easier for second-and third-generation immigrants to be naturalized.

### 4. Right to marriage and choice of spouse (art. 5 (d) (iv))

163. During the period covered by this report, family law in the Civil Code has been radically revised;[196] the right to divorce was at the heart of this revision. The guiding principles were the introduction of no-fault divorce, the encouragement of divorce by mutual consent in the interests of all parties concerned, the best possible protection of children's interests and balanced treatment of the financial consequences of divorce. The reform also had other objectives: on the one hand, the rules on record-keeping in registry offices were to be reviewed and those offices were to be encouraged to work in a more professional way so as to ensure their records were more reliable and, on the other, the law on marriage was to be simplified and shortened.

164. With regard to the requirements for a marriage to be valid, the new provisions include the following new features, as compared with the regulations described in paragraph 114 of the initial report:

Paragraph (a): The age of civil majority and the right to marry was lowered to 18 years (CC, art. 96) in an earlier revision of the Civil Code (mentioned in the initial report) which took effect on 1 January 1996. This age limit is valid without exception, for both men and women;

Paragraph (b): The absolute impediment to marriage for persons suffering from mental illness has been dropped in the revised Civil Code;

Paragraph (c): The new Civil Code provides for a right of appeal for persons deprived of legal capacity whose legal representative refuses to consent to the marriage (CC, art. 94 (2));

Paragraph (d): In the new law on marriage, the grounds for impediment have been reduced to the strict minimum (CC, arts. 95 and 96). Thus, the impediments to marriage based on relationship by marriage have been abolished (except in the specific case of a child of the spouse). Moreover, in order to consolidate the equality before the law of adopted and natural children, the possibility of granting an exemption from the ban on marriage between adoptive brothers and sisters has been removed. Finally, the procedure for dissolving a marriage when one of the spouses dies has been simplified considerably (CC, art. 38 (3));

Paragraph (e): Under the revised civil law, no provision is made for maintaining the publication of banns.

165. One of the main objectives of the revision was, as has been mentioned, to actually put into practice equal rights for women and men. Thus, the new Civil Code gives concrete expression to the constitutional article on equality (OFC, art. 4 (2); NFC, art. 8) by repealing the regulations that until then had run counter to equal rights (for example, the waiting period imposed on women before they could remarry, provided for in the former CC art. 103 (1), or the restriction of the role of guardian to men, provided for in the former CC art. 382 (1)) and by introducing the new provisions required to put this equality into practice (for example, in divorce cases, the equal sharing between the former spouses of the entitlements built up during the marriage in relation to an occupational provident fund). Article 14 of the Federal Constitution ("The right to marry and to have a family is guaranteed") places the right to marriage and choice of spouse under the protection of the Confederation, thereby guaranteeing the institution of marriage.[197]

166. Different kinds of family structure are increasingly accepted by the Swiss population. The new divorce law takes this change into account, for example by providing, in CC article 133 (3), for the possibility of joint custody if both parents request it and it is in the best interests of the child. Moreover, the new civil law provides that unmarried parents may apply to the guardianship authority for joint custody on the same conditions as divorced parents (CC, article 298 (a) (1); this subject was covered in paragraph 116 of the initial report).

167. Swiss legislation does not include a general definition of the "family". For example, for ECHR article 8 to be invoked in the areas of the registration of foreigners and family reunification, the Federal Court requires there to be a family tie between the foreign person and a person having either the right to live in Switzerland (permanent resident permit or Swiss citizenship) or, at the very least, a well-grounded claim to a residence permit or to renewal of a residence permit. This tie must, moreover, be intact and a practical reality.[198] The main family ties recognized by the Federal Court as grounds for granting a residence permit are the relationship between spouses and the relationship between parents and their minor children living in their household. In the case of persons who are not part of the nuclear family, a foreign national seeking permission to stay in Switzerland must be dependent on persons in possession of a residence permit in the country if a family tie is to be recognized as entitled to protection.[199]

168. According to the Federal Court's case law, half-brothers and half-sisters may, in certain circumstances, invoke ECHR article 8 to request family reunification in Switzerland. This is the case when an adult authorized to live in Switzerland has a half-sister or half-brother who is dependent on him or her (ATF, 120, Ib, 261). Article 8 is also applicable when a foreign person can claim to have an intact relationship with his or her child when the child is authorized to live in Switzerland, even if that person does not have parental responsibility or custody of the child under family law (ATF, 115, Ib, 97). Otherwise, regular contact between the child and parent may suffice, for example, when the parent regularly exercises visiting rights (ATF, 120, Ib, 1).

169. The Federal Court's case law with regard to LSEE article 7 should also be mentioned. The article stipulates that "The foreign spouse of a Swiss national has the right to be granted a residence permit and to have it extended". The Federal Court has confirmed that, even in this

case, a two-year prison sentence constitutes grounds for expulsion and may thus entail loss of the right to extension of a residence permit, even though the foreign national may invoke ECHR article 8. A sentence of this order represents a limit beyond which it can be presumed that the person convicted is a serious threat to public safety and order, as mentioned in ECHR article 8 (2).

### 5. Right to own property (art. 5 (d) (v))

170. Since the complete revision of the Federal Constitution, the right to own property has been guaranteed by article 26. This right applies to physical and legal persons in private law, and to persons having rights in need of protection. Foreigners may claim this right in the same way as Swiss people.

171. The Federal Act concerning the Acquisition of Real Estate by Persons Living Abroad, of 16 December 1983,[200] continues to restrict (through a system of permits and quotas) the acquisition of real estate by foreigners who do not have the right of permanent residence in Switzerland. However, as a result of the acceptance of the bilateral agreements reached with the European Union, the Act will also have to be amended.

### 6. Right to inherit (art. 5 (d) (vi))

172. As regards the right to inherit, which in Switzerland applies to every person without any distinction, reference may be made to the explanations given in paragraph 119 of the initial report.

### 7. Right to freedom of thought, conscience and religion (art. 5 (d) (vii))

173. Article 15 of the Federal Constitution sets forth the following principles:

"Article 15. Freedom of conscience and belief

1. Freedom of conscience and belief is guaranteed.

2. Every person has the right to freely choose his religion, and also to form his philosophical convictions and to profess them individually or in the company of others.

3. Every person has the right to join or belong to a religious community and to receive religious instruction.

4. No person may be forced to join or belong to a religious community, to perform a religious act or to receive religious instruction."

#### (a) Freedom of conscience and civilian service

174. The Federal Act concerning Civilian Service (LSC), of 6 October 1995, mentioned in the initial report (para. 123), entered into force on 1 October 1996.[201] The possibility of performing unarmed military service was maintained for the same reasons as those entitling a person to

perform alternative civilian service, namely, an inability to reconcile military service or any other form of armed service with his conscience. Civilian service is not an alternative to military service since the individual is not free to choose between the two. A person subject to military service who wishes to perform civilian service must demonstrate that he cannot reconcile military service with his conscience. The law no longer makes any distinction between the various categories of conscientious-objector status. As regards persons who refuse to serve, appearance before a military tribunal and conviction by such a tribunal have been replaced by an administrative decision.

175. Between early October 1996 (date of entry into force of the LSC) and late June 1998, a total of 3,198 persons applied for authorization to perform civilian service: 1,987 of those cases were assessed at first instance, 1,540 authorizations being granted and 256 applications being refused; 108 applications were not considered as they did not meet procedural requirements; 83 applications were withdrawn. In other words, 77.5 per cent of the applications considered were granted. In 1999, 414 conscripts (1.4 per cent) expressed interest in alternative civilian service.

176. Generally speaking, any person not wishing to perform military service for reasons of conscience now submits, within the prescribed period, an application to perform civilian service in order to avoid being considered as refusing to serve. For this reason, the number of cases considered by the military tribunals and convictions for refusal to serve have declined appreciably since 1996.[202]

**(b) Freedom of worship**

177. The establishment of religious communities is unrestricted in Switzerland and, like the establishment of associations, may not be subject to authorization. All religious communities enjoy the same right to freedom of worship. Furthermore, as indicated in the initial report (para. 121), the cantons freely determine their relationships with the churches; taking due account of freedom of belief and conscience, they may in particular designate one or more churches public-law entities and subsidize them or allow them to levy taxes.[203] As regards public-law status and the institutional integration of Muslims in Switzerland, mention may be made of the following proposed cantonal legislation:[204]

(i) Canton of Neuchatel: apart from the Protestant Church and the Catholic Church, the proposed new cantonal constitution[205] will also provide that public-law status may be granted to other religious communities;

(ii) Canton of Zurich: on the basis of an initiative of two cantonal councillors, an amendment to the law is due to be put to the vote this year or next; it provides that, in addition to the National Reformed Evangelical Church, the Roman Catholic community and the Christian Catholic parish, the public-law status recognized by the State may be extended to other religious communities.

178. In the canton of Bern, the Jewish Communities Act entered into force on 1 September 1997. Thus, for the first time, a Jewish community in Switzerland has been granted the status of a public-law community, this was hitherto possible only for the Catholic

and Reformed churches. This status goes further than the State recognition practised in other cantons (the cantons as a whole are sovereign in matters of worship). With the ordinance on the remuneration of rabbis, which entered into force at the same time as the law, the remuneration of rabbis by the canton has been put into effect.

179. Burial in accordance with Islamic practice is one of the concerns of Muslims in Switzerland. Graves must be oriented towards Mecca and remain "eternally" in that condition, which is often contrary to cemetery regulations. In its decision of 7 May 1999,[206] the Federal Court rejected a Muslim's complaint that in public cemeteries there was no entitlement to a section reserved exclusively for Muslims or any guarantee of burial maintained for an unlimited period (the eternal rest required by Islam). In 1999, the Bern municipal council approved an amendment to the city's cemetery regulations permitting the creation of a Muslim section and voted a credit of 45,000 francs, to be used for the creation of 250 graves. Since 1978, the city of Geneva has made available a "Muslim area" for Muslims in the Petit-Saconnex cemetery, ensuring the eternal rest of the dead. In the canton of Basel-Stadt, a burial guide in six languages intended for Muslims will be published in March 2000.

180. On 20 March 1998, Parliament adopted[207] an amendment to the Federal Act concerning Work in Industry, Crafts and Commerce (LTr).[208] Article 18 stipulates that, provided they notify their employer, employees may be exempted from work on the occasion of religious holidays other than those recognized by the cantons. This enables persons of faiths other than the Catholic or Reformed faith to observe their holidays.

**(c) Religious and moral education**

181. Article 62 (2) of the Federal Constitution makes the cantons responsible for providing an adequate basic education in public schools. These schools must be non-religious, free and compulsory, and must be attended by members of all faiths without any infringement of their freedom of belief and conscience.[209] The Federal Court takes very seriously the requirement of religious neutrality, as has already been shown by its judgements on the display of crucifixes in classrooms[210] or concerning the complaint by the father of a young Muslim girl to whom the cantonal authorities had refused to grant an exemption from group swimming lessons; the Court stated that no public interest overrode private interest in the case of such an exemption.[211]

182. The Federal Court's judgement of 12 November 1997 is of fundamental importance for schooling and freedom of conscience and belief.[212] A woman teacher in a State primary school in the canton of Geneva was in the habit of wearing a headscarf in accordance with the requirements of the Koran. The school authorities initially paid no attention to this matter, and no complaint was received from pupils or parents. It was only on the recommendation of a school inspector to the education authorities that the latter, on the basis of article 27 of the old Federal Constitution and Geneva school legislation (which provides for the non-religious nature of schools), ordered the teacher to desist from wearing the headscarf. When her appeal to the Council of State failed, she submitted a public-law appeal. The Federal Court, on the basis of OFC article 49, ECHR article 9 and article 18 of the second Covenant, considered that the particular style of dress chosen by the complainant because of her religious belief enjoyed protection, but not absolute protection. The Federal Court first rejected the argument (E. 2a) that the headscarf worn by the teacher was of a type freely on sale, represented an aesthetic

choice and was therefore of no religious significance. The wearing of the headscarf was prescribed by the Koran and was therefore a religious matter. It was not a minor religious symbol, but a significant one. The Court thus concluded that the prohibition of the wearing of the headscarf by the teacher must have a sufficiently firm legal basis, meet a higher interest (in particular, the religious neutrality of schools) and be proportionate. The Federal Commission against Racism also welcomed that decision, since it advises cantonal and communal authorities to find pragmatic solutions to problems connected with minority relations. The Commission is not in favour of a general ban on headscarves, but considers that persons performing symbolic functions (such as teachers) should not wear them. The Geneva teacher has taken the case to the European Court of Human Rights, which has not yet reached a decision.

183. The following case is a good example of the pragmatism recommended: in the canton of Neuchâtel, a school board forbade a young girl to wear the Islamic headscarf in a State primary school. The Cantonal Department of Education and Culture accepted the father's appeal, on the basis of the position adopted in 1996 by the Inter-Cantonal Conference on Public Education in French-speaking Switzerland and Ticino, to the effect that pupils are allowed to wear traditional religious symbols (such as the cross, the kippa or the veil). This decision was confirmed by the cantonal administrative tribunal in June 1999.

184. The wearing of the Islamic headscarf has given rise to a few other disputes during the period under consideration. In 1999, the Geneva university hospitals refused to admit to a course three Muslim women medical students who wanted to wear the headscarf during their work, which, in the opinion of the Commission, should not be branded as a discriminatory practice.

### 8. Right to freedom of opinion and expression (art. 5 (d) (viii))

185. Whereas the Federal Court has since 1965 considered that freedom of expression constitutes an unwritten constitutional right,[213] the new Federal Constitution now expressly protects freedom of expression in article 16.

> "Article 16. Freedoms of opinion and information
>
> 1. Freedom of opinion and freedom of information are guaranteed.
>
> 2. Every person has the right freely to form, express and disseminate his opinion.
>
> 3. Every person has the right freely to receive information, to obtain information from generally accessible sources and to disseminate information."

186. It should also be borne in mind that article 10 of the European Convention and article 18 of the second Covenant also protect the right to freedom of opinion and expression and that any person who considers that this freedom has not been respected may invoke these provisions. In accordance with article 36 of the Federal Constitution, and also article 10 of the European Convention and article 19 of the Covenant, any restriction on a fundamental right must be based on a legal foundation, be justified by a public interest or the protection of the fundamental right of another person, and be proportionate to the purpose sought. The initial report (para. 135) mentioned the specific restriction on freedom of expression imposed on foreigners under the

Federal Council decree of 24 February 1948 concerning political speeches by foreigners (RS 126), which stipulated that a foreigner who did not have a long-term residence permit in Switzerland could not speak on a political subject at a public or private meeting without special authorization. This provision has repeatedly been termed obsolete in recent years. On 25 September 1996, therefore, the Council of States recommended the Federal Council to abrogate it, which was done on 9 March 1998, with effect from 30 April of that year.

187. In addition, on 15 June 1998, the Federal Council abrogated its decree of 29 December 1948 relating to subversive propaganda (RS 127). This provision was issued under the emergency right to combat the communist threat. In recent years, it has mainly served at particular times to confiscate documents, recordings and emblems of international organizations calling for civil war or violence, whose publication would have been punishable under the article on racism.

188. Article 16 (3) of the Federal Constitution contains new provisions relating to freedom of information: every person has the right freely to receive information, to obtain it from generally accessible sources and to disseminate it.[214] The concept of "generally accessible sources" does not imply - unless the law provides otherwise - access to administrative documents. Jurisprudence is somewhat restrictive on this point.[215] In December 1997, the Federal Council received three motions from Parliament calling for the introduction of a regime of transparency. It considered that such regime should be introduced, but with due caution. The aim is to guarantee in principle the public nature of the affairs and documents of the federal administration. Several cantons have already introduced this regime in one form or another in their legislation (Bern, Appenzell Ausserrhoden, Schaffhausen, Solothurn, Zug). At present, a federal bill concerning transparency of administration is at the consultation stage. It is aimed at facilitating public access to administrative documents and thereby promoting transparency in the administration. Every person must in principle enjoy a right of access; in other words, he may ask to consult administrative documents or to be informed about them. The transparency regime must thus be introduced in the federal administration, together with a reservation imposed by the need for official secrecy.

### 9. Right to freedom of peaceful assembly and association (art. 5 (d) (ix))

189. Freedom of assembly, which the initial report described as an unwritten constitutional right, is now provided for in article 22 of the Federal Constitution as a fundamental right.

> "Article 22. Freedom of assembly
>
> 1. Freedom of assembly is guaranteed.
>
> 2. Every person has the right to organize assemblies and to take part in them or not to take part in them."

190. Since 1993, foreigners have been able to vote in their diplomatic or consular missions and to organize electoral campaigns in Switzerland for their national elections. In addition, the Federal Council having on 30 April 1998 abrogated the decree on political speeches by foreigners, they no longer have to apply for special authorization to speak at political meetings.[216]

191. It should be further noted that the number of political demonstrations, i.e. large demonstrations attended by more than 1,000 people, increased from 21 in 1997 to 32 in 1998.[217] This was due to the increase in demonstrations by foreigners living in Switzerland protesting against repression in their country of origin. There were 12 in all in 1998 (as compared with 4 in 1997): 9 organized by Kosovo Albanians, 2 by Turkish Kurds and 1 by Tamils. In 1999, events in the Balkans and the imprisonment of the Kurdish leader Öcalan resulted in a further increase in the number of political demonstrations by foreign residents in Switzerland. Since 1998, Kosovo Albanians have been responsible for the two largest demonstrations (20,000 and 15,000 participants), which were both held in Bern.

192. Article 23 of the Federal Constitution also guarantees freedom of association as a fundamental right.

> "Article 23. Freedom of association
>
> 1. Freedom of association is guaranteed.
>
> 2. Every person has the right to form, join or belong to associations and to participate in associative activities.
>
> 3. No one may be forced to join or belong to a particular association."

193. Whereas article 56 of the old Constitution provided for the right of "citizens" to form associations, the new text clearly extends this right to foreigners without restrictions. The passage of the initial report relating to political associations of foreigners, on which it was possible to impose tighter police restrictions than on corresponding Swiss associations, thus no longer applies. The criteria for the imposition of restrictions to which unlawful or subversive associations may be subject (CP, art. 275 ter) are therefore the same in both cases.

### E. Economic, social and cultural rights (art. 5 (e))

194. For complete detailed information on economic, social and cultural rights in Switzerland, reference should first be made to Switzerland's report of 30 June 1994 on the implementation of the first Covenant. In addition, chapter 3 of the updated Federal Constitution expressly mentions social purposes, which was not done in the old Constitution, although the social dimension has always been present in the representation of the Swiss State. The fact that such objectives are contained in the new Constitution is intended to reflect the actual situation in the social sphere. But no specific right can be deduced from the social purposes listed in NFC article 41.[218] The social role of the State is mainly apparent at the cantonal level: most of the recent cantonal constitutions contain an independent roster of social purposes (such as article 30 of the Constitution of the Canton of Bern, or articles 16 and 17 of the Constitution of Basel-Stadt); some even expressly guarantee the right to work, housing and training.[219]

195. Mention should once again be made of the seven bilateral sectoral agreements concluded between Switzerland and the European Union; signed on 21 June 1999, they were approved by referendum on 21 May 2000.[220] Since the free-trade agreement concluded in 1972, these are the

most important set of agreements signed by Switzerland with the European Union. They call for a number of adjustments to Swiss legislation. As regards the free movement of persons, the measures taken by Parliament aim to prevent abuses, in particular the lowering of wages and social conditions. In the context of these measures provision is made, inter alia, for the following:

(a) Seconded workers will be subject to the provisions in force in Switzerland concerning wages and working conditions, and to Swiss labour standards;

(b) In the event of repeated abuses, collective labour agreements may be expanded (facilitated declaration of general scope);

(c) Minimum wages will be introduced in the context of standard labour contracts.

### 1. Right to work (art. 5 (e) (i))

196. As regards the right to work, what was stated in the initial report (paras. 152-159) remains valid. It may be added that workers may, by virtue of the principle of freedom of contract, choose their employment as they please, but there is still no subjective right to employment. The general prohibition of work decided on for one year by the Federal Council applies to asylum-seekers who arrived in Switzerland after 1 September 1999 and runs until 31 August 2000. The advisability of extending this ban is still under discussion. If this measure is abolished, we will revert to the ban on gainful activity during the three months following deposit of the asylum application, as provided for by the Asylum Act; the cantons may further extend this period by three months in certain circumstances (LAsi, art. 43). The prohibition ordered by the Federal Council constitutes above all a deterrent aimed at preventing abuses.[221]

#### (a) Right to just and favourable conditions of work

197. The protection of workers has been improved with the entry into force, on 1 July 1993, of the Data Protection Act (LPD),[222] which was accompanied by a number of legislative amendments, notably to article 328 (b) of the Code of Obligations. This article provides that an employer may process data concerning employees only to the extent that the data relate to the ability of the employee to do his job or are necessary to the performance of the labour contract.[223] The employer does not have the right to question the employee about his opinions or trade-union activities, and the employee is not required to answer such questions. The admissibility of questions relating to religion or certain biographical data is contested by some legal experts.[224]

#### (b) Right to equal pay for equal work and to just and favourable remuneration

198. Statistical records show that on average foreigners earned 13 per cent less than Swiss citizens in 1998.[225] This observation nevertheless requires qualification: whereas foreigners from northern and western Europe (European Union) were better paid than Swiss, those from countries of southern Europe - whether or not members of the European Union - were

considerably less well paid. The discrepancy is accounted for primarily by the level of training and the fact that the branches employing a high proportion of foreigners generally pay lower wages, whereas pay is better in the branches employing few foreigners.

199. In the second quarter of 1998, the standardized median wage[226] of foreign workers was approximately 4,700 francs a month, as compared with 5,400 francs a month for Swiss workers, i.e. approximately 13 per cent greater. Although men of foreign nationality earned 20 per cent less than Swiss, the standardized median wage of foreign women was 15 per cent less than that of Swiss women. There are therefore appreciable differences between the pay of Swiss and foreigners; foreign women constitute the least well-paid group of persons engaged in a gainful activity and are manifestly doubly disadvantaged. No statistic has so far shown any discrimination against foreigners in terms of wages. In fact, the above-mentioned rule does not apply to three branches, which invalidates the theory that foreigners' wages are generally lower: in the manufacturing industry, the standardized median wage is slightly higher than the Swiss average - despite a high proportion of foreigners, many of them from southern Europe; on the other hand, the commercial and repair branch pays low wages, while employing a relatively moderate proportion of foreigners.

### (c) Right to protection against unemployment

200. As regards protection against unemployment, the information given in Switzerland's initial report (para. 158) remains valid.

## 2. Trade-union rights (art. 5 (e) (ii))

### (a) Right to form and join trade unions

201. The right to form and join trade unions constitutes a particular case relatively independent of the right of association, with its own historical development and specific problems. The freedom of formation and activity of associations of workers and employers aiming to organize labour relations collectively is protected by article 23 of the Federal Constitution, and also ECHR article 11, article 22 of the second Covenant and article 8 of the first Covenant.[227] The new Constitution now further expressly guarantees, in article 28, both individual[228] and collective trade union freedom. Further to the initial report, mention should also be made of the existence of the Federal Act of 17 December 1993 concerning Information and Consultation of Workers in Enterprises (law on participation),[229] which entered into force on 1 May 1994.

202. The Data Protection Act (LPD), already mentioned above, governs the processing of data concerning natural or legal persons by private individuals and federal organs (LPD, art. 2 (1)). In article 3 (c) (1) the Act classifies as "sensitive" data relating to the trade union activities of individuals. Article 11 (3) of the Act stipulates that private individuals who regularly handle sensitive data or personality profiles or transmit personal data to third parties are required to declare their files if the processing of these data is not subject to any legal requirement and the persons concerned have no knowledge of them. Private individuals who fail to declare their files (LPD, art. 34) are punishable.

**(b) Right to strike**

203. In article 28 (3), the revised Federal Constitution expressly declares a strike lawful insofar as it derives from trade union freedom.[230] According to prevailing doctrine, a strike is admissible if it has the support of a workers' organization, concerns only labour relations, does not violate an obligation to maintain harmonious labour relations and respects the principle of proportionality.[231] Article 28 (4) of the Constitution provides that the law may forbid certain categories of persons from resorting to strike action. This provision can serve only to guarantee a minimum level of public service. There is an express prohibition of strikes by civil servants and Confederation employees.[232] The Federal Council considers, however, that not all civil servants should be deprived of the right to strike.[233]

### 3. Right to housing (art. 5 (e) (iii))

204. Even after its revision, Swiss constitutional law makes no provision for an express right to housing. Article 41 (1) (e) of the Federal Constitution nevertheless stipulates that the Confederation and the cantons shall endeavour to ensure that any person seeking housing is able to find, for himself and his family, appropriate housing in tolerable conditions.

### 4. Right to public medical care and social security (art. 5 (e) (iv))

**(a) Right to public medical care and medical follow-up**

205. The following information mainly concerns asylum. In view of the general increase in expenditure relating to asylum, the working group on "asylum financing" established by the Confederation has suggested economy measures which are currently under discussion. In the health sector, it has proposed to begin by examining the effects of the restrictions, introduced on 1 October 1999, concerning service providers (doctors, hospitals) for asylum-seekers and persons provisionally admitted, before consideration is given to a restriction on the services themselves. A motion proposed in the National Council[234] called on the Federal Council to submit to Parliament a bill restricting the medical services to be provided to asylum-seekers, persons provisionally admitted and persons in need of protection, and sets deficiency criteria for eligibility for care. In its policy statement, the Federal Council affirmed that, even though the Confederation's expenditure on care for these persons has increased since 1996 (see table below), it is not possible to determine the exact cost of care provided to asylum-seekers, persons provisionally admitted and persons in need of protection. The following figures comprise the costs of premiums, contributions and deductibles. They account for approximately 90 per cent of the cost of care provided to asylum-seekers, persons provisionally admitted and persons in need of protection. Other costs include dental fees (3.5 per cent of expenditure) and other care-related costs (accommodation in homes, etc.), which account for 6.5 per cent of expenditure.

| 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|
| Sw F 83.9 million | Sw F 87.3 million | Sw F 113.3 million | Sw F 147 million (1999 budget) |

206. Over the same period, gross expenditure on compulsory insurance for care was as follows (expenditure on sickness insurance, contributions and deductibles included, for all insured persons: Swiss nationals, foreigners and persons in the asylum category):

| 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|
| Sw F 12 459 million | Sw F 13 138 million | Sw F 14 024 million | Sw F 14 476 million (forecast) |

207. In recent years, Switzerland has granted protection to a large number of people coming from regions where there have been civil wars (notably Bosnia-Herzegovina and Kosovo). It has in the first place received disabled or sick people. This fact and the trauma experienced by most of these people during the civil wars naturally account for the differences in costs noted by comparison with Swiss insured persons.

208. The Federal Council amended Ordinance No. 2 on asylum[235] on 1 October 1999. This amendment obliges the cantons to restrict the freedom of choice of providers of services to asylum-seekers. It is now the responsibility of the cantons to develop a system of first-resort doctors ("gate-keepers") suited to their situation. It may comprise a system of family doctors with medical advisers, a health maintenance organization (HMO) or a fully-fledged health network such as that in the canton of Vaud. The restriction of the services themselves is, however, still under discussion.

**(b) Right to social security and social services**

209. As indicated in the initial report, the Swiss social security system is composed of various branches of insurance, without distinction as between Swiss citizens and foreigners. The basic old-age, survivors and disability (AVS/AI) insurance system - or the "first pillar" - initially provided for different treatment for foreigners with regard to (a) eligibility for benefits and (b) the possibility of receiving benefits abroad. The tenth revision of the AVS, which came into effect on 1 January 1997, eliminated this difference in treatment as between Swiss and foreigners with regard to access to benefits, in terms of contributory payments. Since 1 January 1997, any person living and/or working in Switzerland must contribute until he gives up his gainful activity and at least until he reaches the normal AVS retirement age (65 for men and 62 for women up to the year 2000). Since this revision, any person fulfilling the required conditions is entitled to his own pension or individual disability benefit. Nationals living in Switzerland of a State with which no specific agreement exists (or their survivors) are entitled to benefit in the event of realization of the risk provided they have contributed for at least one full year to the Swiss AVS/AI (statutory minimum of one year's contribution).

210. Since the entry into force of the tenth revision of the AVS, and in conformity with the decision of the Federal Insurance Court (TFA) of 15 October 1999,[236] entitlement to an AVS or AI benefit no longer depends on whether the insured person has personally paid his contributions for at least one year. Apart from possible coverage of education bonuses or benefits for assistance tasks, the one-year minimum contribution required by law in the AI field may also be met in the absence of a gainful activity if the person has been insured for over 11 months in all (voluntary or compulsory insurance) and was during that time married to a partner engaging in a

gainful activity and paying at least double the minimum contribution (disability insurance regulation [RS 831.201], art. 32 (1); old-age and survivors insurance regulation [RS 831.101], art. 50; LAVS [RS 831.10], art. 3 (3) (a) and art. 29 ter (2) (b). The tenth revision of the AVS has in this respect brought the treatment of foreigners into line with that of Swiss citizens.

211. In October 1995, the Federal Supreme Court recognized an unwritten constitutional right to minimum conditions of existence, capable of being put into effect (ATF, 121, I, 367). The Court considered that meeting basic human needs is essential in a community based on law and democracy. It endorsed expert legal opinion, which attributes recognition of this right to the following constitutional principles: the principle of human dignity, which guarantees to every person what he or she is entitled to expect from the community in order to lead a human existence; the right to life, the prime element of freedom of the individual, which would no longer be guaranteed if his survival were no longer ensured; personal freedom, which guarantees all basic manifestations of personal development; and the principle of equality, which also acts as a guarantee of a minimum of material justice. The Court considered that foreigners, just like Swiss citizens, may invoke this right to minimum conditions of existence, irrespective of their status in Switzerland.[237] This decision gave rise to an initiative by the Council of Europe's Steering Committee for Human Rights, which called for a study on the human being's right to meet basic needs and on legal means of realizing this right.[238]

212. Article 12 of the Federal Constitution has incorporated this jurisprudence of the Federal Court and mentions this right to assistance in situations of distress:

> "Any person who is in a situation of distress and is unable to support himself has the right to be helped and assisted and to receive the means essential for leading an existence consistent with human dignity."

### F. Right of access to any place or service intended for use by the public (art. 5 (f))

213. Article 5 (f) of the Convention requires States parties to guarantee in law access without discrimination to "any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks". Under CP article 261 bis (5), Switzerland has established penalties for these traditional forms of apartheid and segregation which jeopardize the right of every person to perform lawful acts of everyday life for the purpose of obtaining the goods necessary for his or her existence.

214. Most of the convictions handed down under enactments prohibiting racial discrimination have been for racist or anti-Semitic acts or spoken or written statements.[239] Not until the period under consideration has there been a criminal conviction for refusal to provide a service intended for the public. This is accounted for in particular by the difficulty in proving a racist motive for such refusal, when the refusal is conveyed orally and the person concerned subsequently claims that he or she was not motivated by racist considerations.[240] This has given rise to the publication of certain legal opinions proposing that the burden of proof should be reversed, as is the case with the law on equality between men and women.

## V. EFFECTIVE REMEDIES (ART. 6)

215. Persons who, because of their ethnic, cultural, linguistic or religious identity, are exposed to discriminatory, hostile or violent acts, or who may be threatened by such acts, enjoy protection at various levels in Switzerland. Vis-à-vis the public authorities, they may avail themselves of the various rights accorded to them by the Federal Constitution. As to the general legal framework for the protection of human rights and the system of compensation and rehabilitation of victims, reference should be made to the Swiss core document, which constitutes the first part of reports of States parties (HRI/CORE/1/Add.29, paras. 46 et seq.).

216. In addition, mention should be made of the Council of Europe agreements specifically relating to human rights; they are unquestionably based on the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights - ECHR).[241] In its content, the Convention largely reflects the Universal Declaration of Human Rights of 1948 and, above all, protects the classic individual rights. Just like the freedoms guaranteed by the Constitution, the material provisions of the Convention are immediately applicable and are binding on public authorities at all levels. Citizens may directly invoke the provisions of the Convention after the time limit for appeals to the national courts has elapsed by lodging an individual appeal with the European Court of Human Rights.

## VI. MEASURES IN THE FIELDS OF TEACHING, EDUCATION, CULTURE AND INFORMATION (ART. 7)

### A. Introduction

217. Efforts to combat racism have been stepped up and developed at various levels during the period under consideration in the fields of teaching, education, culture and information. Much is owed in this respect to the constant dedication of a range of State institutions and organizations at all levels, and to their cooperation with NGOs and civil-society associations.

### B. Federal level

#### 1. Federal Commission against Racism

218. On 23 August 1995, the Federal Council decided to establish the Federal Commission against Racism (CFR), which commenced its activities on 1 September 1995.[242] The Commission is free to define its tasks in accordance with its mandate;[243] in its first five years, it concentrated on the following points:

(a) Contacts with the cantons;

(b) Creating a network of specialist NGOs;

(c) Schools, media, the workplace and public authorities;

(d) Situation of "travellers";

(e) Situation of Muslims in Switzerland;

(f) All forms of anti-Semitism.

219. In December 1998, a motion submitted by the bourgeois parties requested that the Commission should be wound up,[244] on the grounds that, inter alia, it was unnecessary, and that its mandate was too broad and included hollow phrases that were impossible to put into practice. However, the numerous measures taken by the Commission and the projects currently under way, which can only be summarized here, paint a very different picture.[245] In its position on the motion, the Federal Council noted that the Commission's work was regarded favourably by the administration, the media, interested sectors of public opinion and political circles. The following is a broad outline of the Commission's major activities, mentioning in each case a representative project and actions geared specifically to prevention.[246]

**(a) Operational activities**

220. The Commission's work includes public relations, and awareness and prevention campaigns focused on efforts to combat racism. The following examples are particularly representative:

(i) The "Der Schöne Schein"[247] (Fine Appearances) campaign, launched on 9 June 1997, is based on a series of posters and advertisements, and has had a considerable impact in the media and on public opinion;

(ii) The brochure SPOCK, aimed mainly at young people, was devised as part of the campaign against exclusion and xenophobia. It is in the format of a newspaper and was presented to the press on 15 October 1997. Its first German edition had a print-run of 100,000 copies and was distributed in schools, firms, associations and trade unions. In 1999, a regional version was published, with articles in Italian and French;

(iii) The biannual bulletin TANGRAM (published for the first time in October 1996) is targeted at politicians, national and local authorities and other interested groups. Its factual articles on major issues inform and stimulate discussion. It is distributed free of charge to members of Parliament, federal, cantonal and communal administrations, cantonal libraries and, increasingly, interested groups among the general public. It has a print-run of 10,000 copies.

**(b) Advisory activities**

221. The Federal Commission against Racism advises and assists the federal authorities in the preparation and implementation of legislation, and in the preparation of their views and reports. It also provides assistance to individuals and plays the role of intermediary (see section (e) below for its role as mediator). Its activities have included:

(i) Consultations on the Arbenz report concerning Switzerland's immigration policy and on the revision of the Federal Constitution (1996);[248]

(ii) Opinion on the city of Bern's integration policy guidelines (1997);

(iii) Recommendations on combating anti-Semitism, contained in the report "Anti-Semitism in Switzerland. Report on its historical and present-day manifestations with recommendations for action" (1998);

(iv) Proposals on the problem of separate classes.[249]

**(c) Cooperation activities**

222. The Commission engages in various cooperation activities: it collaborates with public authorities at all levels (communal, cantonal, national and international), and develops and maintains contacts with NGOs and interested groups. Examples include:

(i) Implementing measures to prevent anti-Semitism: discussions with the Swiss Federation of Protestant Churches and the Conference of Swiss Bishops, and also with NGOs;

(ii) Organizing, in association with the Council of Europe, an international meeting on "The Place and Role of National Specialized Bodies Combating Racism" (22-24 October 1998) at the Swiss Institute of Comparative Law;

(iii) Organization, in 1999, of a meeting (due to become annual) between NGOs and the Swiss delegate to the Council of Europe's European Commission against Racism and Intolerance (ECRI);

(iv) Cooperation with NGOs with a view to the development of the national SOS-Racism telephone hotline and on an ad hoc basis.

**(d) Scientific analyses**

223. The Commission encourages the scientific and ethical study of racist phenomena, and also the compilation of information on specific situations and their social repercussions. The following examples may be cited:

(i) Publication, in December 1998, of the study by Walter Kälin and Martina Caroni on discrimination in the law concerning foreigners, "Diskriminierungsverbot und Familiennachzug" (Prohibition of discrimination and family unification). As a follow-up to this study, the Commission organized on 14 January 1999, in association with the Institute of Public Law and the educational extension service of the University of Bern, a specialist meeting on discrimination on ethnic and cultural grounds;

(ii) Organization of symposia on topics such as the institutional integration of Muslims in Switzerland (University of Bern, 18 January 2000), and participation in meetings of researchers in Switzerland and abroad;

(iii) Co-production of the work "Rassendiscriminierung. Gerichtspraxis zu Artikel 261 bis StGB" (Legal practice with reference to the anti-racist provisions of CP article 261 bis), in cooperation with the Foundation against Racism and Anti-Semitism and the Society for Minorities in Switzerland (published in 1999).

**(c) Role of mediator**

224. To a certain extent the Commission also acts as a mediator, within the limits of its remit and available resources:

(i) It serves as an information centre for individuals in situations of conflict or discrimination;

(ii) It takes the initiative in acting as a mediator. It has, for example, made approaches to cantonal governments to urge them to set up cantonal information centres for victims of racist acts and for the resolution of intercultural conflicts.

225. The Commission examined between 250 and 300 cases submitted to it between September 1995 and March 1998. About one third of these came from individuals and the rest had their origin in the media, pressure groups or information submitted by Commission members and NGOs. In 65 per cent of cases, the problem was solved by a telephone call or a letter to the authority concerned. In one third of the cases, the cantonal services were involved. The conflicts varied in length, some lasting no longer than a single intervention and others more than a year. While it was rarely possible to arrive at a solution embodying complete agreement, the Commission's action very often calmed the situation. This is an incentive to move from mere conflict resolution to genuine prevention.

226. To sum up, the record shows the Commission to have been very active in the prevention of racism and anti-Semitism over wide areas of public life and to have carried out work of high quality.[250] Special mention must be made of its mandated function of mediator, which its president is carrying out devotedly, with the support of the secretariat. The Commission plays a pivotal role in informing and motivating the cantonal administrations and authorities. The cantonal representatives to the Commission exercise an important function in this regard. The Commission's regular meetings with its partners in the cantons are also very useful.

## 2. The Federal Commission on Foreigners

227. The Federal Commission on Foreigners (CFE), set up by a decree of the Federal Council in 1970, was incorporated by Parliament, in June 1998, in the Federal Act concerning the Temporary and Permanent Residence of Foreigners (LSEE). Its terms of reference, already described in detail in the initial report, involve exploring the opportunities for improved coexistence between Swiss and foreigners, and fostering and supporting initiatives in that regard. The Federal Council can now enlist the help of this Commission under the terms of the above-mentioned Act. The Commission is currently authorized to propose the payment of subsidies and to express a view on requests for subsidies (LSEE, art. 25 (a)). This article enables the Confederation to provide financial support for integration projects initiated by the cantons.

communes or third parties - which must, however, assume a proper share of the financing of these projects. Integration thus becomes a joint task, a fact which underlines its political and social importance. Mention should be made in this context of the CFE report on integration, published in October 1999 (see also para. 228 below).

228. In 1995, the Federal Council had requested the Commission to prepare a report for Parliament on Switzerland's future integration policy. A preliminary draft report gave rise in 1996-1997 to wide-ranging consultations among all the Swiss and foreign organizations concerned. The report, entitled "The integration of male and female immigrants in Switzerland", was submitted on 22 October 1999. It recommended in particular the development of language learning and continuing education for adult foreigners, and a greater involvement of foreigners in political decision-making and in projects for promoting the integration of foreigners in schools. The Federal Department of Justice and Police (DFJP) has given the Federal Aliens Office (OFE) the task of preparing an integration ordinance based on this report and LSEE article 25 (a), which is due to enter into force on 1 October 2000. It is planned to allocate 5 million francs to support projects in 2001, and the Confederation will subsequently increase this aid to 7.5 million francs.

229. The Federal Council took note of the Commission's report on 12 January 2000. It decided to integrate the Commission secretariat within the OFE of the Federal Department of Justice and Police (DFJP), on which it was already administratively dependent.[251] This new distribution of authority and the associated extension of the Commission's field of activity should, inter alia, speed up the introduction of major integration measures. The incorporation of the Commission secretariat within the OFE should enable all immigration questions, with the exception of those relating to asylum and refugees, to be handled within a single department.[252] The Federal Council expects this step to give rise to greater synergy, improved coordination and the elimination of duplication. Being able to rely on an administrative structure means having the financial and human resources as well as the skills required to address problems properly and being in a position to exchange information directly on other aspects of integration that are handled by the OFE (particularly labour-market and naturalization issues). This is very important from the standpoint of the implementation of LSEE article 25 (a) (promotion of integration by the Confederation). The conditions are therefore right for the integration of the resident foreign population to become one of the cornerstones of the Confederation's policy on foreigners.[253]

### 3. Federal Commission for Refugees

230. The main role of the Federal Commission for Refugees is to serve as an advisory body to the federal authorities. Its organizational rules were revised and officially adopted on 18 November 1997 on the basis of the results of an internal inquiry conducted by the Commission in 1996 on its activities and future functions, and also on the objectives of the DFJP. Special mention should be made here of the inventory of functions drawn up on this occasion, which is a revised version of the mandate that the Federal Council adopted by decree on 6 March 1995. The formulation of article 1 (2) of its rules reflects the growing importance of financial matters in asylum and refugee policy. The tasks of the Commission have thus been defined as follows:

"Tasks. Article 1

"1. The Commission shall assess, for the benefit of the Federal Council and the federal administration, the asylum and refugee situation.

2. It shall adopt a position on questions relating to all aspects of asylum and refugee policy, including its political, legal, humanitarian and social dimensions. It shall help to frame an asylum and refugee policy that takes account of human, technical and financial factors and is likely to command a broad consensus.

3. It shall give its views on the practice followed by the Confederation on asylum questions and shall play a part in the development of asylum and refugee policy.

4. It shall deal with general immigration problems, particularly as they relate to asylum and refugee policy.

5. It shall make its views known, under the consultation procedure, on the preparation of legislation in the asylum, refugee and immigration sphere.

6. It may be consulted on asylum and refugee questions arising in the framework of international agreements signed by Switzerland.

7. It shall draw up an annual activity report for the Federal Council, to which it shall submit its recommendations.

8. It shall work, within the framework of a coordinating committee, in close collaboration with the Federal Commission on Foreigners and the Federal Commission against Racism, and shall maintain links with other federal commissions insofar as their activities are relevant to its mandate."

231. On 27 September 1996, the Federal Commission for Refugees organized a meeting on the prospects for refugees fleeing violence in Bosnia, which was attended by, among others, representatives of the Swiss and foreign authorities concerned. At the meeting organized by the Commission on 18 November 1997 concerning the report of the expert commission on migration, the Federal Commission on Foreigners gave its views on possible follow-up to the project, the objectives of a viable immigration policy and the need for long-term thinking in this domain.[254] On 29 October 1998, the Federal Commission for Refugees organized a meeting to compare the asylum situation in Switzerland with that in other European receiving countries. In November 1999, it submitted to the Federal Council its recommendations, together with a report entitled "Rejection and acceptance of applications", which was made public in mid-February 2000.

### 4. Cooperation between the commissions

232. During the period under review, cooperation has been developed at the federal level, i.e. between the commissions dealing with racism, foreigners and refugees. In June 1998, they produced a common opinion on the new immigration model recommended by the DFJP group of

experts. On 25 March 1999, the members of the Federal Commission against Racism and the Federal Commission for Refugees held a joint meeting for the first time; they reviewed the common features and differences of their respective spheres of activity, and the possibility of intensifying cooperation between them.

### C. Cantonal and communal institutions

233. Mention must finally be made of the efforts of the cantons to set up cantonal centres to deal with questions of discrimination, or to develop existing centres. Once again, it is hard to distinguish between cases of specifically racial discrimination and problems concerning human rights in general. Currently, for example, there is still no centre with a mediating role that handles general human rights violations: the mandate of the Federal Commission against Racism is specifically limited to racial discrimination. The creation of a national body of this kind is currently under consideration.[255]

234. There exist in the cantons of Basel-Stadt, Basel-Land and Zurich, and in the cities of Zurich, Bern and Winterthur, cantonal or communal mediators providing readily accessible advisory and arbitration services. They intervene in conflicts between individuals or those between individuals and public authorities, and thus in practice defend human rights. Sometimes these mediation centres are also authorized to act in cases of discrimination (e.g. in Basel-Stadt and Zurich).

235. Centres specifically responsible for questions of discrimination are also in the process of being set up, or are already incorporated in existing bodies:[256]

(a) In certain cantons, such centres are under consideration or are in the process of being created, as in Appenzell-Ausserrhoden and Fribourg;

(b) In various cantons, discussions are currently taking place on the establishment and the precise form of commissions or departments with special responsibility for questions relating to foreigners; this is the case, for example, in the cantons of Aargau, Basel-Stadt, Bern, Geneva, Solothurn, Zug and Ticino.

236. There also exist, in a few Swiss towns and communes, private or semi-private centres providing advice in cases of conflict or racial discrimination; some work directly with the public services or are supported by them. Examples of such centres are:

(a) Zurich: Konfliktophon (cultural conflict advice centre); TikK-SOS-Team on intercultural conflicts and violence, part of the Swiss Public Utility Society (SSUP); the bi-national interest group (advice on marriage, residence permits, children, etc.); the DERMAN centre for the intercultural promotion of health for Turks, linked to the Swiss Workers Mutual Aid Organization (OSEO);

(b) Bern: Intermedio (advice and mediation on intercultural questions and conflicts); advice centre for foreign women and their families - BAFFAM (advice on everyday problems, relations with public authorities, insurance questions, etc.); the "Augen auf" human rights association (advice on asylum questions and abuses by institutions); Asylhilfe Bern (advice); Bildung und Entwicklung Foundation (advanced training for teachers);

(c) Lausanne: Association romande contre le racisme - ACOR (advice and mediation); Education and Development Foundation;

(d) Geneva: International League against Racism and Anti-Semitism - LICRA (legal advice).

## D. Measures concerning teaching and education

### 1. General information

237. Training in school has a special role in meeting the objectives laid down in article 7 of the Constitution. For a general account of the training system in Switzerland, reference may be made to Switzerland's initial report. Above all it must be borne in mind that, as explained in detail in that report, the Swiss educational system is strongly characterized by federalism.

### 2. Activities of the Conference of Cantonal Directors of Education to combat and prevent racism

238. As already said, education and training are first and foremost a matter for the cantons, which are engaged in many ways in combating racism and xenophobia in the field of education. This is attested by the declaration of the Conference of Cantonal Directors of Education (CDIP) of 6 June 1991, which highlighted the fact that the universal problem of human rights, and also the problem of coexistence in Switzerland with persons from other countries and with different cultures, represents a challenge for the country's education system.[257]

239. It is the cantons that are mainly responsible, with the help of the Confederation, for putting into practice the principles relating to the campaign against racism in education. Accordingly, on 24 March 1997, the CDIP "School" working group organized an information meeting for the education authorities and education staff on the project "Schools without racism". The measures proposed and initiated in the educational field included better and more intensive training for children of foreign mother tongue, particularly in the local language, greater integration of the intercultural dimension in the initial and further training of teachers, and the provision of increased help to persons of foreign mother tongue in the choice of a profession or in the context of vocational training.

240. In June 1998, the Federal Commission on Foreigners and the Federal Commission against Racism organized a national meeting on language support courses and on the geographical and cultural study of regions in Swiss schools. The main partners involved in this conference were representatives of the diplomatic, educational, scientific and economic communities, and also associations of immigrants and foreign parents. These proceedings confirmed the importance of courses of this kind for the society and economy of the receiving country, and for the families of immigrants and the development of children. The two organizing commissions echoed, on behalf of the Confederation and the cantons, the appeal made by the participants to Swiss schools and enterprises to expand the provision of these courses.

### 3. Debate on segregation in schools

241. Overall, foreign children account for 22 per cent of primary-school pupils in Switzerland,[258] but in certain urban areas the proportion may rise to 90 per cent of the class. The parents of children of local origin fear that there will be a drop in standards and that their children will be disadvantaged. The media have fuelled the controversy by reporting calls for segregation in schools, and there have been demands in political circles for the creation of separate classes. In two primary schools in German-speaking Switzerland, separate classes were recently introduced on a permanent basis for children of foreign mother tongue. In one place, the experiment has not been renewed following two three-year cycles. In the other town, a fresh experiment will be undertaken in another district.

242. The CDIP and other educational bodies have already come out clearly in favour of cohabitation between the local and immigrant populations, the integration of children of foreign mother tongue and multicultural schooling. Experts are of the opinion that the school integration programme is feasible subject to the introduction of a set of coordinated measures. It would even be possible in this way to make good the slight retard (less than 10 per cent) observed in mixed classes.

243. The CDIP has prepared a report on segregation,[259] together with the following recommendations:

(a) Political notions calling for separate classes should be rejected;

(b) The Federal Commission against Racism (CFR) recommends abolishing separate classes as quickly as possible;

(c) The CFR urges all schools to draw up guidelines for "diversity in schools". This is the appropriate educational response to potential calls for the setting-up of separate classes;

(d) The financial resources required to apply the new school models geared to the challenge of classroom diversity should be made available to encourage all children to develop their individual skills and to provide support to the teaching profession;

(e) It should be possible through empirical research to study in greater depth issues such as equality of opportunity and the prejudices likely to arise in a multicultural setting;

(f) The CFR requests the CDIP to publish a recommendation rejecting the segregation of Swiss and immigrant children at school, in line with the recommendations it made in 1991 and reiterating the arguments already put forward by the cantonal education departments;

(g) The CFR urges everyone to oppose the apartheid tendencies that are emerging in society. The media have a special responsibility in this regard; it is for them to develop and further a better understanding of the multicultural society.

244. In its reply of 31 May 1999 to a parliamentary question,[260] the Federal Council stated its position thus on the question of separate classes for Swiss and foreign pupils: "The Federal Council holds firmly to the view that measures amounting to discrimination against a particular category of pupils cannot represent a solution. The school cannot place anyone at a disadvantage on account of his or her origin, race or language. That would be contrary to the constitutional principles of equality before the law and non-discrimination, and would run counter to the objective of integration". It noted, moreover, that the introduction of separate classes for Swiss and foreign children is contrary to the constitutional principles of equality of rights and the prohibition of any form of discrimination (NFC, art. 8) and also article 28, in conjunction with article 2, of the Convention on the Rights of the Child. It is virtually irreconcilable with articles 13 and 2 (2) of the first Covenant. Separate classes are also, clearly at odds with the International Convention on the Elimination of All Forms of Racial Discrimination.

245. However, the imperative of non-discrimination does not rule out measures to benefit pupils who have an inadequate or no command of the language used in teaching (induction or support course of limited duration, for example, or attendance at a preparatory or transitional class for a limited period). So long as the principle of equality of opportunity is not infringed and separation does not take the form of permanent segregation, it is wholly in keeping with constitutional law that children should follow an induction or support course corresponding to a need for remedial language work because of their origin. In view of the situation, this may even be highly desirable from the standpoint of integration. Moreover, such measures are consistent with the provisions of certain cantonal constitutions or school legislation according to which every child should receive an education adapted to his or her abilities.

### 4. Activities at the federal level

246. For other activities at the federal level, reference may be made to Switzerland's initial report. The CFE's report on integration of October 1999 underlines in particular the importance of school projects furthering the integration of foreign pupils.

## E. Measures concerning culture and languages

247. Article 69 of the Federal Constitution provides that culture is within the competence of the cantons. However, paragraphs 2 and 3 of this article add the following qualifications:

> "2. The Confederation may promote cultural activities of national interest and encourage artistic and musical expression, particularly through the promotion of training.
>
> 3. In carrying out its functions, it shall take into account the country's cultural and linguistic diversity."

248. Freedom of language, a fundamental right that was hitherto unwritten although recognized by the Federal Court, is now embodied in article 18 of the Constitution:

> "Freedom of language is guaranteed."

248. Article 70 of the Constitution establishes the bases for the Confederation's efforts to promote languages. The new text of the article on languages makes provision for encouraging understanding between the four linguistic communities. A "languages bill" is under preparation,[261] with a view to the implementation of the constitutional provisions concerning languages and understanding (NFC, art. 70 (1, 3 and 4)). This text is intended to govern the use of the official languages by the Confederation (particularly Romansch - a partially official language of the Confederation), the encouragement of understanding and exchanges between the linguistic communities, and assistance to the multilingual cantons.

250. To strengthen the mission assigned by law to the Swiss cultural foundation Pro Helvetia in the sphere of understanding, the Federal Council has proposed to Parliament that a special allocation of 2.5 million francs be made for the period 2000-2003, i.e. an average of 625,000 francs per annum, for new activities aimed at promoting understanding. The Confederation has previously given financial support to several private organizations and establishments pursuing cultural activities through the media, promoting understanding at the national level, and addressing the concerns and problems of the foreign population.

### F. Measures concerning information and the media

251. At the request of the Political Institutions Commission attached to the National Council, the Federal Council, in July 1999, called on the DFJP to undertake a consultation on the preliminary draft of the revised Constitution as it related to the media and to initiate measures in the domain of press policy.[262] The revision of the Constitution has provided the opportunity to address the question of the concentration of the press and its repercussions on freedom of thought and the democratic process. A particular concern was to safeguard the quality of the press, and to encourage the media to exercise its watchdog function and to observe standards of fairness and professional ethics.

252. Mention should be made here of the Federal Court decision of 10 August 1999, in which the Court took the view that the principle of liability in series could not be applied in cases of racial discrimination.[263] A person distributing a book containing racist remarks cannot invoke that principle, which is written into the criminal law on the press, and ascribe all responsibility for the offence to the author.

253. The Press Council is an institution of particular importance in this context. In 1998, it carried out a survey of Swiss newspapers and noted an upsurge in racist statements in 1997 and 1998, especially in readers' letters, despite the provisions of article 261 bis of the Criminal Code.[264] The Press Council organized a meeting with members of the Federal Commission against Racism, the Swiss Federation of Jewish Communities and other interested groups, and in December 1999 recommended that letters from racist, discriminatory or xenophobic readers should be withheld and not printed, even if their content did no more than reflect a latent tendency.[265] The journalistic code of ethics should also apply to the editorial treatment of readers' letters. The more hotly debated the topic, the stricter the press must be in rejecting letters revealing latent discrimination, and the narrower the margin of manoeuvre becomes with regard to freedom of expression. In future, editorial staff should also check the letter columns in other newspapers for signs of organized letter writing. Where a huge volume of racist and discriminatory letters is received, the topic should be covered by a staff journalist, other than in the letters column.

254. Regarding measures to combat racist and anti-Semitic advertisements on the Internet, Switzerland is in the forefront of what is being done worldwide. At the expert seminar held from 16 to 18 February 2000 on the World Conference against Racism, a great many proposals were made to service providers and government departments.[266] Various measures to combat racist propaganda on the Internet have already been implemented in Switzerland.[267]

255. One such measure, it may be recalled, is the "Internet Patrol" pilot project launched in 1998 by the Federal Office for Police Matters.[268] Currently, the development of closer contacts between the cantonal police and Internet service providers should lead to practical solutions that will put a stop to this kind of advertisement. For example, in mid-October 1999 two operators - Swisscom and Sunrise - blocked an Internet page with a racist content,[269] which offered a link to a site where the works of a negationist author could be ordered. Swisscom also confirmed the blocking of the site of the Belgian foundation "Vrij Historisch Onderzoek", which contained revisionist and anti-Semitic texts. In addition, it blocked five other racist sites in response to a recommendation by the federal police.

256. Various public administrative services publish regular information brochures detailing the positive measures prescribed by the International Convention on the Elimination of All Forms of Racial Discrimination; these are distributed not only to interested individuals, but also with an educational intent. In addition to the newspapers and brochures mentioned in the initial report (para. 201), the following examples may be cited:

(a) The Agency for Development and Cooperation (DDC), within the Federal Department of Foreign Affairs, provides a great deal of information on Switzerland's cooperation with third-world countries and the former Eastern bloc, and also on humanitarian aid.[270] The relevant documents are for the most part supplied free of charge in several language versions;

(b) The periodical Entwicklung/Développement, dealing with aspects of North-South relations, is published jointly in German and French by the DDC and the State Secretariat for Economic Affairs.

257. The public administration services also endeavour to provide, via the Internet, comprehensive and regular information to all concerned on the events that have taken place in their respective spheres of operation and on the activities of the Confederation.

## PART THREE: POSITION ON THE CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION OF 30 MARCH 1998

### I. GENERAL INFORMATION

258. The Committee considered Switzerland's initial report (CERD/C/270/Add.1) at its 1248th and 1249th meetings on 3 and 4 March 1998. At its 1268th meeting on 17 March 1998, it adopted the concluding observations (CERD/C/304/Add.44) which are commented on below. Switzerland took note with satisfaction of the fact that the Committee welcomed the establishment of a Federal Commission against Racism (CFR) and the initiatives

taken by the Commission in the sphere of education and information. The Committee also welcomed the adoption of article 261 bis of the Criminal Code. In its concluding observations, however, the Committee also mentioned some subjects of concern and made corresponding suggestions and recommendations for the attention of the Swiss authorities. The initiatives taken subsequently are explained below.

## II. LACK OF COMPREHENSIVE LEGISLATION TO COMBAT DISCRIMINATION (CONCLUDING OBSERVATIONS, PARAS. 5 AND 10)

259. In paragraphs 5 and 10 of its concluding observations, the Committee expresses concern about the lack, in Switzerland, of comprehensive legislation to combat discrimination based on race, colour, descent or national or ethnic origin. The Committee considers that such legislation should include measures to combat racial discrimination in labour relations and housing and, more generally, racial discrimination by any person, group or organization, as required by article 2 (1) (d) of the Convention.

260. The competent services have examined the question of the concept of comprehensive transversal legislation to combat discrimination. Given the complexity of the subject, and in the interests of the fullest and most flexible possible ban on any form of discrimination, the path of specific legislation was considered the most judicious one. Pursuant to the prohibition of any discrimination expressed positively in article 8 of the Federal Constitution, the choice has therefore centred on sectoral approaches: thus, for example, a legislative programme aimed at eliminating inequalities affecting disabled persons has been sent for consultation.

261. Other proposed legislation provides for the explicit introduction of a prohibition of discrimination in legislative acts. Thus, article 2 of the preliminary draft, dated September 1999, of a federal bill concerning human genetic analysis contains a provision prohibiting "any form of discrimination against a person on account of his genetic inheritance". In this connection, the Federal Council's explanatory report states (in para. 212):

> "The prohibition of any discrimination against a person on grounds of genetic inheritance is addressed both to State organs and to private individuals. The preliminary draft does not, however, lay down a special provision, whether civil or criminal, for a person who considers himself to be a victim of discrimination on account of his genetic inheritance. It is only in relation to other legal provisions that article 2 of the preliminary draft acquires a genuine practical scope. Thus ... article 2 may have a scope ... for the interpretation of the civil-law provisions on protection of the personality (CC, arts. 28 et seq.)."

262. The Federal Council has also begun the revision of the Federal Act concerning travellers engaging in commerce (RS 943.1). The main purpose of this revision is to enable travellers working in Switzerland to pursue their occupations more easily, and hence to eliminate de facto discrimination (see SECO report of 19 October 1999 on the implications of Switzerland's ratification of ILO Convention No. 169 concerning indigenous and tribal peoples, p. 17; this report was adopted by Federal Council decree on 24 November 1999).

263. On various occasions, case law has given practical effect to the prohibition of discrimination and has indirectly transposed it into the context of private law.[271] As regards criminal law, the Federal Court has considered that racial motives must in no circumstances be used to justify an increase or aggravation of the penalty (ATF, 125, IV, 1, E. 5b).

264. It should be further borne in mind that the Swiss legal order is based on a monistic tradition.[272] Thus, international law and national law fall within the same normative system. The provisions of international law form an integral part of the Swiss legal order as from their entry into force in Switzerland. The international legal instruments extend their effects into the internal legal order without need to introduce them into national law by means of a specific enactment.[273] Consequently, the provisions of the Convention - like those of any other international treaty - have been legally binding on all organs of the State - legislative, executive or judicial - as from the Convention's entry into force for Switzerland.

265. As regards the hierarchical position of the Convention, it should be emphasized that the provisions of international law override those of national law. On numerous occasions, the Swiss Government and the Federal Court have confirmed the principle of the primacy of international law over federal or cantonal law.[274] As with all the international conventions, this principle obviously applies also to the International Convention on the Elimination of All Forms of Racial Discrimination.

266. According to the Swiss authorities and case law, a provision of international law is "self-executing" when it is formulated in a sufficiently precise and specific manner to serve as a basis for a decision in particular cases. In the final analysis, it is for the courts to decide on a case-by-case basis whether the corresponding provision of an international convention is self-executing or not. Various decisions of the Federal Court have related to the International Convention on the Elimination of All Forms of Racial Discrimination.[275]

267. Generally speaking, the importance of international law has greatly increased during recent years. To the extent that international law overrides national law, the latter - including constitutional law - must be interpreted in conformity with international law, and hence the international treaties binding on Switzerland.[276] In this respect, interpretation in conformity with the principles of the European Convention is one of the important principles to which the Federal Court very frequently has recourse.[277] In the context of the enforcement of the Asylum Act of 5 October 1979, the Federal Court has also arrived at an interpretation consistent with international law when it has been called upon to consider respect for the principle of the prohibition of refoulement.[278]

268. Attention should further be drawn to the fact that the new Foreigners Bill is under preparation. This bill provides for a general improvement in the legal situation of foreigners living in Switzerland. Although it is not a comprehensive text aimed at combating discrimination, the conception of the new law nevertheless confers on it a general effectiveness with regard to discrimination, notably through measures to encourage integration.

## III. IMMIGRATION POLICY (CONCLUDING OBSERVATIONS, PARAS. 6 AND 11)

269. In paragraphs 6 and 11 of the concluding observations, the Committee notes that Swiss immigration policy was undergoing revision at the time of submission of the initial report. It nevertheless expresses its disquiet at the existing so-called "three-circle" immigration policy, which classified foreigners according to their national origin and capacity for integration. The Committee considers the conception and effects of this policy to be stigmatizing and discriminatory, and therefore contrary to the principles and provisions of the Convention. It further recommends that Switzerland should reconsider the reservation made to article 2 (1) (a) of the Convention.

270. As has already been explained,[279] the old "three-circle" immigration policy was abandoned in October 1998 and, in conformity with the proposals of the expert commission on migration, the Federal Council adopted a "binary admission system". In concrete terms, workers are recruited on a priority basis from countries members of the European Union and EFTA, provided that there is no manpower, notably unemployed persons, available on the Swiss labour market. Derogations from this principle are allowed only when the recruitment of skilled workers is required or an exception is justified on special grounds. As before, these authorizations are issued as part of fixed quotas and subject to compliance with the normal conditions of remuneration and work in the profession concerned. Apart from training courses related to development assistance projects, admission with a view to employment must serve economic interests. This principle is obviously not applied to admission for important humanitarian reasons, for purposes of family reunification or for periods of study.

271. The priority accorded to nationals of States members of the European Union admittedly comes within the context of the sectoral bilateral agreements.[280] In this connection, however, it should be noted that the seven sectoral bilateral agreements between Switzerland and the European Union were signed in Luxembourg in June 1999. Following the favourable outcome of the referendum of 21 May 2000, the agreements may enter into force as soon as the ratification procedures in the various member States have been completed (at the earliest in 2001). The withdrawal of Switzerland's reservation to article 2 (1) (a) of the Convention may be reconsidered when the situation of nationals of third States is settled with the entry into force of the bilateral agreements with the European Union and the new law on foreigners.

272. Furthermore, it should be recalled that the recent revision of the LSEE and of legislation on asylum has made it possible to introduce various improvements, in addition to the measures to combat abuses in the area of asylum (see para. 64 above). In this connection, the enforcement of the revised LSEE article on integration is of particular importance.

## IV. NATURALIZATION POLICY AND CONCERN ABOUT THE EXTENSIVE SYSTEM OF POLICE CONTROL OF FOREIGNERS (CONCLUDING OBSERVATIONS, PARAS. 6 AND 10)

273. The extensive system of police control of foreigners, and naturalization policies and procedures constitute further areas of concern for the Committee, which considers the latter to be too protracted and too selective.

274. A question submitted to the National Council on 6 October 1999[281] asked the Federal Council for information on communal naturalization procedures liable to give rise to the expression of xenophobic tendencies. This parliamentary intervention raised, in particular, the question of the compatibility of such procedures with the International Convention on the Elimination of All Forms of Racial Discrimination.

275. The acquisition of a communal right of citizenship is a precondition for the acquisition of Swiss nationality through the ordinary naturalization procedure. The granting of the right of citizenship is a political act and, as such, may not be subject to substantive legal examination.[282] Consequently, the competent communal body may reject an application for naturalization without stating any reasons - even if the applicant fulfils all the naturalization conditions.[283] It is true that, when an application is rejected, the exact reasons are not known. Sometimes, however, refusals concern only persons originating from certain countries, even when they fulfil all the conditions for naturalization. The unavoidable conclusion in such cases is that nationality has been a determining factor in the decision to reject the application for naturalization.

276. During the spring 2000 session of the Federal Chambers, five parliamentary motions and one parliamentary question were lodged concerning naturalization.[284] The popular vote of 12 March 2000 in the commune of Emmen (canton of Lucerne) was largely responsible for these parliamentary actions; of 23 applications for naturalization, all 19 applications from persons of Balkan origin were rejected. This decision led to sharp criticism of existing naturalization procedures in the national media.[285] During question time on 20 March 2000, in reply to questions on this subject from members of Parliament, the Federal Council clearly expressed its dismay and disappointment regarding both the procedure and the result of the Emmen vote.[286] The Federal Council has nevertheless pointed out that the communes have freedom as regards decisions on naturalization. Since the resources of the federal legislature are very limited in this respect, it is the cantons which could introduce possible appeal procedures. The limitation of the competence of the communes in the area of naturalization would require a constitutional amendment.[287]

277. After the events in Emmen, a decision by the administrative tribunal of the canton of Basel-Land on a similar case also attracted attention. On 4 December 1997, the municipal assembly of the commune of Pratteln had rejected the applications for naturalization by 21 Turks out of 22 and by 4 citizens of the former Yugoslavia out of 5. Furthermore, this assembly accepted all the other applications. Six Turks, including a couple, contested the decision and brought the case before the Council of State. In October 1998, the Council rejected the appeal and the case was brought before the administrative tribunal. On 29 March 2000, this tribunal - ruling as a constitutional court - considered the case. Deeming it unfounded, it rejected the claim of procedural irregularity invoked by the applicants. Furthermore, it did not accept their pleas to the effect that, by contravening the International Convention on the Elimination of All Forms of Racial Discrimination, the refusal of naturalization was contrary to international law: the Convention is binding on the legislature and may not be invoked in questions involving the executive. Although no right to naturalization exists, the administrative tribunal considered that the rejection of the applications in question was contrary to the rules forbidding arbitrary acts and to the principle of equality before the law and was, accordingly, unconstitutional. The right of the municipal assembly to reject a naturalization application was not called into question. The administrative tribunal nevertheless stated that even decisions by the people must respect the

principle of equality before the law and the prohibition of arbitrary action. In its view, it was clear that the refusal was arbitrary and discriminatory vis-à-vis certain national and religious affiliations. It consequently decided to rescind the decision of the municipal assembly and to refer the case back to the municipal commune of Pratteln for a new decision. The commune of Pratteln has decided not to bring the matter before the Federal Court.

278. As regards the compatibility of naturalization practice with protection against arbitrary acts (NFC, art. 9), with the principle of human dignity (NFC, art. 7) and with the prohibition of any form of discrimination (NFC, art. 8 (2)), it should be emphasized that, fundamentally, the principle of the popular vote does not contravene the provisions of the Convention.[288] The municipal assembly may freely decide to accept or reject applications for naturalization. As the example of Pratteln shows, recourse to a popular vote is at most likely to increase the risk of abuse of popular rights. For this reason, the Federal Council wishes to avert a situation where it will in the future still be possible to take arbitrary decisions of that kind on a naturalization matter. It has therefore decided to harmonize, simplify and accelerate the procedure, notably by means of minimum requirements. During the current legislature, it will submit to Parliament a new bill on facilitated naturalization for young foreigners who were born and have grown up in Switzerland. Thus, a working group on the "right of citizenship", instituted by the DFJP, is in the process of examining all the questions raised by the five motions mentioned in paragraph 276 above. Its final report, which is expected in late 2000, will also cover the question of the general introduction of an appeal procedure in the event of the unjustified rejection of an application for naturalization.[289]

279. On the question of the need for special police controls, it should be emphasized that, according to the statistics for criminal convictions, over 40 per cent of convictions in Switzerland between 1992 and 1996 concerned foreigners (of whom about a third were resident abroad).[290] According to police crime statistics, the proportion of foreign offenders was 51.5 per cent in 1997 (in which year there were 68,070 convictions).[291] According to the same statistics, the proportion of foreign offenders was 54.9 per cent in 1998; it seemed to stabilize at this high level in 1999 (54.3 per cent). For the first time since 1994, the upward trend did not continue. One fifth of the approximately 31,000 foreigners charged were resident abroad.

280. Controls are also essential in order to combat unlawful employment. In any event, the principle of proportionality must be respected in all controls of this kind (see para. 281 below).

## V. CONCERN ABOUT CASES OF POLICE BRUTALITY IN DEALINGS WITH PERSONS OF FOREIGN ETHNIC OR NATIONAL ORIGIN (CONCLUDING OBSERVATIONS, PARAS. 6 AND 10)

281. The Committee also expresses its concern about serious cases of alleged police brutality involving persons of foreign ethnic or national origin.

282. As regards this alleged ill-treatment by cantonal police forces, particularly of foreigners, it should be emphasized that the Swiss Government is monitoring the situation very carefully. When serious cases of police brutality involving persons of foreign ethnic or national origin are reported, the competent cantonal services - because of cantonal sovereignty in police matters - or the CFR are notified.

283. Obviously, during the course of an arrest for example, the use of force must be kept to a minimum and any constraint exerted by the police beyond this limit can in no circumstances be justified. These principles of professional ethics are well known to police officers. If cases of ill-treatment, notably during an arrest or police custody, were actually to occur, the cantonal police would take action against those responsible by means of disciplinary or judicial proceedings. Ill-treatment by police officers may comprise a number of offences: bodily injury, assault, insults, threats, coercion, abuse of authority and, of course, racial discrimination. Such offences, which necessarily involve abuse of authority, are prosecuted automatically or on the basis of a criminal complaint and are tried in a criminal court. In most cantons, the facts are examined by a public prosecutor, investigated by an examining judge and ruled on by a court. The ruling at first instance or the decision to dismiss the case may be appealed at the cantonal level, and then in the Federal Court. The same holds for civil proceedings, which the injured party may institute in order to obtain compensation for material and non-material damage (CO, arts. 41 et seq.), and for disciplinary proceedings initiated by the competent authority.

284. It has been found that complaints regarding ill-treatment often originate from foreign nationals and that the cantons generally involved are Geneva and Ticino, i.e. border cantons, and Zurich. Moreover, these cantons have airports and the proportion of foreigners living in them is very high. Over 39 per cent of the population of Geneva, for example, is made up of foreigners. About 60 per cent of the persons arrested are foreigners, many of whom are temporary visitors. Statistically, therefore, it is understandable that many of the complaints are filed by foreigners.

285. In this connection, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) welcomed the fact that, since its most recent visit to Switzerland, the Geneva cantonal police have adopted many measures to prevent ill-treatment and heighten police awareness of human rights, stress management and improved relations among different ethnic groups.[292] The measures adopted also include the obligation to mention any use of force in police reports, the availability of a doctor from the University Institute of Forensic Medicine and the appointment of an impartial investigator when a complaint is filed. The CPT concluded its report by expressing the earnest hope that similar measures would be adopted throughout Switzerland.

286. In its progress report of 2 June 1997 in response to the above-mentioned CPT report, the Federal Council fully agreed (p. 5) with the CPT's view that it was highly desirable that measures similar to those adopted in Geneva should be adopted in all Swiss cantons as part of efforts to prevent ill-treatment. The Federal Council nevertheless recalled that the adoption of such measures remained the responsibility of the cantons, to which the CPT's recommendation would be communicated. It should also be noted that the Geneva police has had a code of ethics since August 1997.

287. In this connection, it should be recalled that, since the entry into force of the new Federal Constitution on 1 January 2000, the provisions of article 31 (2) have been applicable. These provisions are aimed at ensuring that any person who is deprived of his freedom is immediately informed of his rights in a language that he understands. Article 31 (2) of the Constitution reads as follows:

"2. All persons deprived of their liberty have the right to be informed immediately, in a language that they understand, of the reasons for their detention and of their rights. They shall be given the opportunity to exercise their rights. In particular, they have the right to have their relatives informed."

## VI. TRAINING PROGRAMMES FOR LAW ENFORCEMENT OFFICIALS (CONCLUDING OBSERVATIONS, PARAS. 6 AND 10)

288. The role of prevention is as important as that of enforcement. On the question of relations with persons of other ethnic or national origins, for a long time now efforts have been made to improve the awareness of members of the criminal prosecution authorities by means of intensive training programmes. Thus, on the proposal of the Conference of Heads of Cantonal Departments of Justice and Police, the Swiss Police Institute in Neuchâtel has developed two programmes aimed at increasing awareness of intercultural problems among police officers. These programmes relate to (a) the police, immigrants and ethnic minorities, and (b) human rights and fundamental freedoms. They are intended for members of the police forces of the various cantons, and some cantons have organized their own training programmes. Thus, the Association of Cantonal Police Forces of Central Switzerland has developed training programmes on similar subjects intended for police officers.

289. In this context, Switzerland's activities within the Council of Europe concerning the role of the police in the protection of human rights, notably in the course of the preparation of the "Police and Human Rights 1997-2000" programme, are worthy of mention. In preparation for Human Rights Week, to be held from 30 October to 4 November 2000, the Swiss Police Institute was instructed by the Swiss Conference of Cantonal Police Commanders to prepare a manual intended for police instructors. This future educational tool, drafted in conjunction with the Geneva-based Association for the Prevention of Torture, will be publicly presented on the occasion of a human rights course for middle-level members of police forces, which is to be held in late October 2000.

290. As to human rights education for law enforcement officers, a new basic training programme for prison staff and an advanced programme for senior personnel have also been prepared by the Swiss Prison Personnel Training Centre. These courses were initiated in the autumn of 1995. They form part of on-the-job training and their introductory elements are taught directly by the canton concerned. They consist of 15 weeks of theoretical training, which primarily stresses the psycho-pedagogical disciplines and deal in depth with specific current problems relating to the execution of penalties. The training is aimed at a better understanding of detainees, better management of aggression and clearer identification of security problems.

291. In addition, in the summer of 1999, a regional division of Swiss Federal Railways contacted the CFR and, in the year 2000, will offer a training programme on action to combat racism and on the resolution of intercultural conflicts.

## VII. DE FACTO DISCRIMINATION AGAINST TRAVELLERS (CONCLUDING OBSERVATIONS, PARA. 7)

292. In paragraph 7 of the concluding observations, the Committee expresses its concern about the restrictions on freedom of movement imposed on the Jenish population and on the Sinti and Roma minorities, and about the tendency to discredit them.

293. The "Ensuring the Future of Swiss Travellers" Foundation,[293] which was established to provide support for Swiss travellers, described their current situation in its annual report for 1998. The problems noted essentially relate to the lack of parking and transit areas and to the differences between cantonal regulations governing itinerant professions. These various points are covered in the paragraphs below.[294]

### A. Parking and transit areas

294. The lack of parking and transit areas enabling travellers to perpetuate their way of life is a first important matter of concern. Various cantons and communes have reacted to this problem: thus, the cantons of Bern, Graubünden and Ticino have built several parking areas in recent years. In autumn 1998, the city of Bern, for example, inaugurated an area with 36 parking spaces. Other cantons are in the process of dealing with these questions.

### B. Cantonal regulations on itinerant commerce

295. The second important matter of concern lies in the substantial differences between the various cantonal regulations governing itinerant professions. At the instigation of the above-mentioned Foundation, the Commission on Competition addressed a recommendation to the cantons on 7 September 1998. It recommended that they should review their practice on the authorization of itinerant commerce and abolish restrictions that were not governed by the requirements of fair trading and consumer protection. In addition, the Commission stressed that the authorizations to pursue an itinerant profession (licences) issued by the canton of origin should be recognized by the other cantons.

296. In the meantime, the Federal Council has begun the revision of the Federal Act concerning Travellers Engaging in Commerce (RS 943.1). The purpose of this revision is also to facilitate the pursuit of itinerant professions by travellers working in Switzerland and, hence, to eliminate de facto discrimination in this field (in this connection, see the SECO report of 19 October 1999 (p. 17) on the implications of Switzerland's ratification of ILO Convention No. 169).

297. One characteristic of the culture of travellers is the fact that the education of children is closely linked to the craft activity of the parents. At a very young age, the children help their parents and the other members of the group, thereby acquiring a valuable skill without difficulty. This custom is often perceived as an infringement of the prohibition of child labour. As regards education, various cantons and communes have introduced flexible regulations to ensure the schooling of children, even if they accompany their parents on journeys during the summer. In these cases, the children are monitored and remotely supervised by teachers.

### C. Foreign travellers in Switzerland

298. During the summer period, foreign travellers come to Switzerland to engage in their traditional commercial activities. Tensions regularly arise between foreign travellers and the local population. An inquiry conducted in the various cantons has shown that the places used by foreign travellers are regularly left in a very untidy state. Swiss travellers are also affected by this situation since local residents generally make no distinction between foreign and Swiss travellers; for this reason they have a low opinion of and condemn all travellers. The Federal Department of Home Affairs has instructed the Foundation to make proposals on how to deal with these problems. The Foundation recommends, first, increasing the number of parking and transit areas for travellers; the cantons are invited to cooperate and to set up more areas than are needed, so as to prevent the same places from being constantly occupied and to share the burden evenly between cantons. Secondly, the Foundation proposes splitting the large groups of foreign travellers into several smaller units, in order that the parking and transit areas do not become overcrowded and to make it easier to ensure compliance with the regulations for their use. Thirdly, the Foundation proposes a number of subsidiary measures such as the formulation and distribution of regulations for the use of parking and transit areas; it intends to organize meetings on relations with travellers for cantonal officials and representatives of the Travellers' Association.

### D. Recognition of the culture of travellers

299. In Switzerland, between 1926 and 1973, a minority of travellers were persecuted and discriminated against by the "Children of the Road" Mutual Aid Association set up by the Swiss Pro Juventute Foundation.[295] Today, at the federal level, the travellers' way of life is recognized and receives assistance, notably in the form of a subsidy paid to the organization which safeguards the interests of Swiss travellers (Travellers' Association) and through the establishment of the "Ensuring the Future of Swiss Travellers" Foundation.[296] The cantons were also dismayed by the results of the study on the above-mentioned Mutual Aid Association published by the Confederation in 1998. On 12 January 2000, the Federal Council dealt with the results of the consultation carried out with the cantons.

## VIII. MATTERS RELATING TO CRIME AND CRIMINAL PROCEDURE (CONCLUDING OBSERVATIONS, PARAS. 8 AND 13)

300. In paragraph 8 of its concluding observations, the Committee expresses its concern about incidents of xenophobia, anti-Semitism, racial discrimination and racial violence, and also the dissemination of racist and xenophobic ideas. It notes that article 4 (b) of the Convention is not fully implemented, notably as regards participation in illegal and prohibited organizations. In paragraph 13 of its concluding observations, the Committee recommends that Switzerland should take the necessary steps to implement article 4 (b) of the Convention. It further recommends that Switzerland should include in its next report information on complaints of discrimination under article 4 of the Convention, on action taken by prosecution authorities and by the competent courts and, where appropriate, on reparation granted to victims.

### A. Information concerning the number of complaints of discrimination and their treatment by the prosecution authorities and the courts

301. For the time being, reference must be made to the data of the Public Prosecutor's Office of the Confederation for statistics of complaints under Criminal Code (CP) article 261 bis and the number of res judicata decisions by the cantonal courts and the Federal Court. In accordance with the ordinance on communication of 28 November 1994 (RS 312.3), it was to this body that the cantonal authorities communicated, up to the end of 1999, all judgements, administrative decisions and dismissal orders handed down pursuant to the relevant legislation.

302. The Confederation Public Prosecutor's Office transmitted to the CFR copies (anonymous), of the procedural decisions of the cantons in pursuant to CP article 261 bis.[297] For the period from the second half of 1995 to the end of December 1998, the CFR possesses a review and summaries of about 80 cantonal decisions pursuant to article 261 bis (see annex). In January 2000, the Federal Police Office replaced the Public Prosecutor's Office as the body competent to centralize cantonal decisions of this nature. However, no official statistics concerning cantonal criminal procedures are available for the moment.

303. On the other hand, relevant documentation is being compiled with a view to constituting a body of legal opinion. In this area in particular, reference may be made to the activities of the Association for Minorities in Switzerland (SMS) and the Foundation against Racism and Anti-Semitism (FRA), which work in association with the CFR. In this connection, mention should above all be made of the supplement to the Niggli commentary (Rassendiskriminierung: Kommentar zu Art. 261 bis StGB und Art. 171c MStG) (Racial discrimination: commentary on CP article 261 bis and CPM article 171(c)), published jointly by SMS, FRA and CFR).[298] This supplement comprises analyses, expert opinions and documentation on the case law from 1995 to 1998 relating to CP article 261 bis, and also a list of 131 decisions on this subject.

304. In addition, SMS and FRA each year publish a chronological list of cases of racism in Switzerland (Chronologie über rassistische Vorfälle in der Schweiz), which is transmitted to 7,000 selected bodies and to the media. This list is updated every month and may be consulted on FRA's Internet site.[299] Although not exhaustive, the list records cases of discrimination in a detailed manner.[300]

305. The chronology of cases of racism in Switzerland, on the FRA site covers the period 1992 to 1998. The figures for 1999 cover only the months from January to June. Information for the following months appears on the pages providing updates on this site.

| Incidents[301] | Number of cases | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
| Racist remarks | 5 | 5 | 6 | 10 | 16 | 8 | 25 | 3 |
| Dissemination of racist tracts or recordings | 1 | 3 | 5 | 11 | 20 | 16 | 9 | 4 |
| Negation of the Holocaust | 1 | 6 | 3 | 2 | 2 | 4 | 2 | - |
| Parades, activism or meetings of the extreme right | 1 | 1 | 2 | 1 | 5 | 6 | 13 | 3 |
| Threats, harassment | 1 | 5 | 13 | 13 | 6 | 3 | 6 | 5 |
| Causing damage, inscriptions and graffiti | 23 | 4 | 9 | 10 | 7 | 10 | 7 | 12 |
| Causing bodily harm | 9 | 6 | 19 | 15 | 6 | 3 | 17 | 7 |
| Arson, gunshots | 20 | 13 | 15 | - | 5 | 2 | 1 | 5 |
| Discrimination | 1 | 4 | 6 | 6 | 6 | 5 | 4 | 2 |
| Rejection of requests for naturalization | - | - | - | 4 | 1 | 7 | 25 | 17 |
| Racism on the part of the authorities | 1 | 1 | 7 | 8 | 6 | 8 | 2 | - |
| Miscellaneous | 4 | 5 | 8 | 14 | 6 | 8 | 4 | 4 |
| Total | 67 | 53 | 93 | 102 | 86 | 80 | 115 | 62 |

306. At the end of April 1998, the federal police published an updated and supplemented edition of Skinheads in Switzerland, which also contains a list of such incidents.

307. The above-mentioned Internet site[302] also offers additional documentation, compiled with the authorization of SMS and FRA, comprising a selection of cantonal decisions in connection with CP article 261 bis. This documentation covers with a number of cases classified by constituent element, entity protected and property under court protection (status as at 30 September 1998):

(a) Entity protected - ethnic group: 1 case;

(b) Entity protected - religion: 8 cases;

(c) Lack of evidence; 2 cases;

(d) Element under court protection - "human dignity": 2 cases;

(e) Constituent element of publicity: 4 cases;

(f) Lifting of parliamentary immunity: 2 cases;

(g) CP article 261 bis 20 cases;

(h) CP article 261 bis (1), incitement to hatred: 6 cases;

(i) CP article 261 bis (1), in connection with paragraph 4, first part: 7 cases;

(j) CP article 261 bis (2), propagation of ideologies: 1 case;

(k) CP article 261 bis (2), in connection with paragraph 4: 1 case;

(l) CP article 261 bis (3), propaganda activities: 5 cases;

(m) CP article 261 bis (4), first part, debasement and discrimination: 12 cases;

(n) CP article 261 bis (4), second part, negation of the Holocaust: 15 cases;

(o) CP article 261 bis (5), refusal to perform a service: 8 cases;

(p) CP articles 58 and 261 bis, confiscations: 5 cases;

(q) Miscellaneous: 6 cases.

### B. Information concerning financial assistance to victims of racist attacks

308. Several members of the Committee asked Switzerland whether and, where appropriate, to what extent the victims of racist attacks had been granted financial assistance.

309. Insufficient practical experience has as yet been acquired to give a clear-cut answer to this question. The question whether, and on what basis, the victims of violations under CP article 261 bis are granted reparation is approached in a large number of different ways. A study requested by the Federal Office of Justice is being prepared. It deals with cantonal decisions under the Assistance to Victims of Offences Act (LAVI). In cases of violations of CP article 261 bis, no final answer has yet been found to the question who, within the meaning of LAVI, is entitled to appeal as a victim or as an injured party, under cantonal procedural law.[303]

310. In the course of the various proceedings which resulted in the payment of compensation, other constituent facts were associated with those of CP article 261 bis. In some cases, costs were awarded to the injured parties. In others, the victims or the complainants in procedures under article 261 bis were able to recover their costs or were compensated financially for moral injury (as in the decision of the Zurich district court of 26 February 1998 (97/07430) which, pursuant to article 261 bis (4), ordered the accused, who had publicly and clearly humiliated a person or group of persons in such a manner as to injure their human dignity (use of the term "elimination"), to pay a fine of 800 francs as well as an amount of 1,000 francs to the injured party for moral injury).[304] In this connection, it should be emphasized that specific decisions depend on the applicable cantonal code of procedure and the interpretation of each cantonal court. The application of LAVI cannot of course be excluded a priori, but case law takes into account the fact that it is not the racist nature of an attack that is the direct cause of moral injury to a person, but the attack itself. This is why some legal circles are calling for procedural and material improvements in the position of the injured party.[305]

311. During the past few years, the military courts have had to deal with war criminals,[306] with the result that the application of LAVI has acquired a new international dimension.[307] Indeed, any person injured by one of the violations falling under CPM articles 108 et seq. may, in accordance with articles 163 et seq. of the Code of Military Criminal Procedure,[308] claim damages under civil law before the Swiss military court dealing with the case, even if the offence was committed abroad and if neither the injured party nor the perpetrator of the offence lives in Switzerland or is not of Swiss nationality. Subject to certain conditions, the victim may also seek assistance from advisory services in accordance with LAVI article 3.[309] Generally speaking, the granting of this assistance depends neither on the nationality nor the domicile of the victim, nor yet on the place where the offence was committed or when. On the basis of the intent and purpose of LAVI article 3, the only thing that matters is that the victim is physically in Switzerland, that he requires assistance in Switzerland and that he has sought such assistance from a Swiss advisory centre.[310] For this reason, the foreign victim of an offence committed abroad may be granted assistance by the advisory services should he require such assistance during his stay in Switzerland.[311]

### C. Prohibition of racist organizations and racist propaganda activities

312. One last question that should be answered in this context is how far Switzerland has complied with its obligations under article 4 (b) of the Convention, namely, to what extent it has declared illegal and prohibited organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and has recognized participation in such organizations or activities as an offence punishable by law.

313. Before the provisions of CP article 261 bis[312] entered into force, the judge could, under civil law (CC art. 78), be petitioned to dissolve an association which engaged in illegal activities. With the entry into force of CP article 261 bis, incitement to racial hatred and racial propaganda were listed as punishable acts, which is why an association engaging in such activities can no longer invoke the guarantee of freedom of association (NFC, art. 23). In April 2000, the (alleged) creation of a nationalist party by a young man of 24 for the first time gave rise to a criminal charge of violation of CP article 261 bis.[313]

314. However, as regards the question of punishing mere participation in such organizations, it must be said that, in view of the importance attached to freedom of opinion and freedom of association in Switzerland, it is obliged to maintain the reservation it entered on this point.[314]

315. Moreover, it would be useful to cite the provisions of CP article 260 ter.[315]

> "Article 260 ter. Criminal organization
>
> 1. A person who has participated in an organization which keeps its structure and membership secret and which seeks to commit acts of criminal violence or to obtain funds by criminal means, or
>
> A person who has supported an organization of this kind in its criminal activities,

Shall be punishable by rigorous imprisonment for a maximum period of five years or by imprisonment.

2. The judge may reduce the sentence (art. 66) of a person who has attempted to prevent the organization from engaging in criminal activities.

3. A person who has committed the offence abroad shall also be punishable if the organization engages in or intends to engage in criminal activities throughout or in a part of Switzerland. Article 3, paragraph 1, second subparagraph is applicable."

316. In this connection, attention is also drawn to the Press Council's recommendation intended to prevent the publication of readers' letters with a racist content - particularly if such letters constitute a concerted activity - and to Switzerland's commitment to combat racist propaganda on the Internet.

## IX. REFORM OF THE FEDERAL CONSTITUTION (CONCLUDING OBSERVATIONS, PARA. 9)

317. The Committee, in paragraph 9 of its concluding observations, recommends that the envisaged constitutional reform should more fully reflect the provisions of the Convention. It expected such reform to entail a clear repudiation of racial discrimination.

318. As has already been pointed out and explained on several occasions (see paras. 75 et seq. above), the new Federal Constitution entered into force on 1 January 2000, together with the various specific prohibitions of discrimination contained in article 8. Through article 8, (2), the concept of "discrimination" was embodied in the text of the NFC. As regards the wording of this article, the new Constitution follows closely the terms used in various international law instruments. Indeed, the article is in general based on international guarantees of fundamental freedoms, in particular the ECHR (art. 14) and the second Covenant (art. 1 (1); art. 24 (1); and art. 26), as well as a large number of cantonal constitutions.[316]

319. This prohibition of discrimination recently embodied in the Constitution may be regarded as constituting a quantum leap in comparison with the "ordinary" equality before the law guaranteed by article 4 of the old Constitution. It clearly strengthens the criteria used in the examination of the facts and reduces the margin for interpretation in all cases in which the legal consequences arise directly or indirectly out of the personal characteristics that are protected against discrimination; moreover, in the same context, it allows guarantees of human dignity to be associated with equality before the law.

## X. INFORMATION AND TRAINING CAMPAIGNS AS PREVENTIVE MEASURES (CONCLUDING OBSERVATIONS, PARA. 10)

320. In paragraph 10 of its concluding observations, the Committee recommends other preventive measures, such as information and training campaigns to strengthen implementation of the Convention.

321. It should first be recalled that Switzerland participates actively in the implementation of the resolutions adopted at Vienna by the Heads of State and Government of the States members of the Council of Europe, and particularly in the preparation of the plan of action of the Council of Europe against racism and intolerance. Switzerland acceded to the International Convention on the Elimination of All Forms of Racial Discrimination in order to combat racism and anti-Semitism. With the establishment of the Federal Commission against Racism (CFR) in 1995, the Federal Council strengthened its activities in this sphere, and more particularly in that of prevention. The explanations given above in paragraphs 218 et seq. provide more detailed information on the CFR's activities. In addition, other activities are organized at the federal level, one example being the report on political extremism in the army during the past few years. The conclusion reached in this report is that extremist tendencies in the army correspond broadly to those which emerge among the civilian population as a whole and that the cases recorded are merely exceptions. However, it emphasizes that clear-cut sanctions are needed and that the army must not in any way tolerate extremist movements. In this context, the Federal Department of Defence, Civil Protection and Sports (DDPS) takes a keen interest in the examination and implementation of other preventive measures in collaboration with the competent services.

## XI. ACTION TO COMBAT TENDENCIES TOWARDS RACIAL SEGREGATION AND TENSIONS WHICH MAY ENSUE (CONCLUDING OBSERVATIONS, PARA. 12)

322. The Committee, in paragraph 12 of its concluding observations, encourages Switzerland to monitor all tensions which may give rise to racial segregation and to work for the eradication of any negative consequences that ensue.

323. The Federal Council's reply of 31 May 1999 to the question put by National Councillor Bühlmann (98.3656) concerning the creation of separate classes for Swiss and foreign pupils may serve as an illustration in this connection since, in stating its position, the Federal Council clearly condemned racial segregation and apartheid tendencies, as may be seen from the following:

> "5. In the International Convention on Elimination of All Forms of Racial Discrimination, the States parties particularly condemn racial segregation and apartheid, and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction (art. 3). The term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (art.1 (1)). The act of creating separate classes for Swiss pupils and foreign pupils could therefore fall under the heading of racial discrimination. Admittedly, article 1 (2) stipulates that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to the Convention between citizens and non-citizens. However, doctrine and practice converge and agree that, contrary to the wording of this provision which may give rise to confusion, the Convention also applies to foreign nationals. A literal interpretation would clearly be at variance with the purposes of the Convention

(cf. Federal Council's message of 2 March 1992, FF, 1992, III, 265). The Federal Council considers that the segregation of pupils is incompatible with the International Convention on the Elimination of All Forms of Racial Discrimination."

## XII. INSTITUTIONAL SUPPORT AND CONTRIBUTIONS TO ACTION TO COMBAT RACISM (CONCLUDING OBSERVATIONS, PARA. 14)

324. In paragraph 14 of its concluding observations, the Committee encourages Switzerland to contribute to the United Nations Trust Fund for the Programme for the Decade to Combat Racism and Racial Discrimination. Furthermore, it expresses the hope that the Federal Commission against Racism will receive adequate resources to enable it to carry out its tasks, and that other organizations and institutions dealing with race relations will also receive the necessary support.

325. As regards the financing of the CFR, it should be noted that this body, like other extra-parliamentary advisory commissions, has an annual budget of 150,000 francs. In October 1999, after the CFR's first five years of operation, the DFI's Secretary-General proposed that Parliament should increase the CFR's operating budget by 50,000 francs for the year 2001. In October 1998, a minority proposal calling for the creation of a project credit of 350,000 francs had been rejected by the National Council by 86 votes to 58. The CFR's budget covers meeting costs, the President's honorariums and the Commission's current projects. In many cases, the CFR works with other bodies and the costs of joint projects are shared. So far, the cost of translating the CFR's multilingual reports and that of printing its publications have been defrayed by the DFI. At the request of the Federal Chancellery, CFR publications are in general made available free of charge.

326. In the 1997, the DFI provided financial support for the CFR's awareness-raising campaign ("Der schöne Schein") totalling 70,000 francs (including the cost of the evaluation study). In 1998 the DFI provided the CFR with 15,000 francs for a study concerning naturalization procedure. The DFI has consistently endeavoured to find sources of financing for projects designed to combat and prevent racism. For example, the "Medienpaket Rassismus" (1998-1999) was financed in the amount of 100,000 francs using the profits derived from minting commemorative coins and 100,000 francs from the Pro-Juventute-Markenfonds. Various amounts provided by the Pro Patria Fund were used to finance other more modest projects. In 1999, the DFI contributed 45,000 francs to finance the special edition of L'Educateur (Schweizerische Lehrerzeitung and Scuola Ticinese), which dealt with Switzerland's role during the Second World War and contained a summary of the CFR report entitled "Anti-Semitism in Switzerland", accompanied by teaching aids for the use of teachers.

327. No federal appropriations have so far been made to finance the ongoing study of questions connected with racism or for the permanent financing of specialized NGOs. During the past few years, however, the Confederation has supported a considerable number of diverse activities. The examples given below are of a random nature and not exhaustive:

(a) In 1991, the Social Security and Public Health Commission submitted to the Federal Chambers a parliamentary initiative proposing the establishment of a foundation entitled "Ensuring the Future of Swiss Travellers", described in section VII above (paras. 292 et seq.).

The Confederation endowed the Foundation with a capital of 1 million francs, as well as - for the first five years - an operating subsidy of 750,000 francs. The Foundation was established on 1 May 1997 and its council of 11 members was appointed;[317]

(b) In December 1996, Switzerland endorsed the amendment of article 8 of the Convention, whereby the way the Committee was financed would be changed in order to increase its efficiency;

(c) On 19 February 1997, under the heading "Voluntary action to promote respect for human rights and international law", the Federal Council earmarked an annual credit of about 1.8 million francs for the period 1997 to 1999 with a view to financing various activities, such as the production of a manual for police instructors. Other activities promoting human rights and international law may be subsidized out of this overall appropriation during the period 2000 to 2003;

(d) Switzerland is also committed to the promotion of the Programme for the Decade to Combat Racism and Racial Discrimination, notably through its support for the Expert Seminar on remedies available to the victims of racism, racial discrimination, xenophobia and related intolerance, which was held from 16 to 18 February 2000 in preparation for the World Conference against Racism (2001). Through its contribution of 50,000 francs, Switzerland defrayed more than half of the Seminar's budget;

(e) From 2001, in accordance with the forthcoming ordinance on integration which is being drawn up, the Confederation will support the integration of foreigners in an amount that for the present has been set at 5 million francs.

## XIII. DECLARATION PROVIDED FOR IN ARTICLE 14 OF THE CONVENTION (CONCLUDING OBSERVATIONS, PARA. 15)

328. In paragraph 15 of its concluding observations, the Committee notes that Switzerland has not yet made the declaration provided for in article 14 of the Convention concerning the procedure governing individual communications. Some members of the Committee therefore request that Switzerland should consider the possibility of making this declaration.

329. At the present time, the administration is examining not only the communications procedure (Convention, art. 14), but also the question of signing or ratifying other international instruments introducing a communications procedure into certain United Nations conventions. An interdepartmental working group consisting of representatives of DFI, DFAE and DFJP has been established to coordinate work on the following:

(a) Communications procedure in the framework of the International Convention on the Elimination of All Forms of Racial Discrimination;

(b) The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;[318]

(c) The first Optional Protocol to the International Covenant on Civil and Political Rights.[319]

Notes

[1] RO, 1995, 1163 ff.; FF, 1992, III, 265.

[2] RS 0.104.

[3] See CERD/C/70/Rev.3 of 23 July 1993.

[4] See CERD/C/270/Add.1.

[5] See, in this regard, the core document HRI/CORE/1/Add. 29, Part I, of 2 July 1993, which constituted the first part of the report of 18 December 1996.

[6] RS 431.112.

[7] Federal Statistics Act of 9 October 1992 (LSF; RS 4341.01).

[8] Average resident population. Source: Federal Office for Statistics (OFS), "Statistique annuelle sur l'état de la population (ESPOP)".

[9] In Western Europe, only Luxembourg and Liechtenstein recorded higher proportions.

[10] OFS, La population étrangère en Suisse, 1998, Neuchâtel, 1999, pp. 7 ff. (see annexes).

[11] It should be noted that the percentage of foreigners in Switzerland varies considerably according to region; thus the canton of Geneva has a much higher recorded proportion of foreigners than the national average (37.6 per cent), whereas the canton of Appenzell-Innerrhoden comprises the lowest proportion of foreigners (0.1 per cent)

[12] In this connection, see para. 67 below.

[13] The number of initial one-year residence permits involving the pursuit of a gainful occupation is set in the quotas allocated at the cantonal and federal levels; the Confederation and the cantons are thus entitled to issue a limited number of such residence permits per year.

[14] As regards the definition of racial discrimination in the sense in which it is understood by the Swiss authorities and in terms of its meaning within the scope of the Convention, see the message of the Federal Council (FF, 1992, III, 274, para. 41).

[15] See para. 23 below.

[16] Article 1 (1) (b) of the Federal Decree approving the Framework Convention; see message of the Federal Council concerning the Council of Europe Framework Convention (FF, 1998, 1033-1071, para. 22)

[17] Recommendation 1201 (1993) on the Additional Protocol to the ECHR.

[18] On this subject, see paras. 76 et seq., below.

[19] The proportion of Italian-speakers has declined from 9.8 per cent (1980) to 7.6 per cent (1990). At the end of 1996, a study on the evolution of Romansch in Switzerland, which had been commissioned by the OFS and the Federal Office for Cultural Affairs, highlighted the fact that this language was in sharp decline, the proportion of Romansch-speakers having fallen from 1.36 per cent to 0.58 per cent between 1980 and 1990 (J.-J. Furer, Le romanche en péril? Evolution et perspective, Bern, 1996).

[20] OFS, Annuaire statistique de la Suisse 2000.

[21] "Commonly employed language" is used in the sense of a language or languages used regularly by someone.

[22] Serb, Croat, Bosnian, Slovene, Macedonian, Bulgarian.

[23] See paras. 241 et seq. below.

[24] OFS, "Situation demographique des communautés religieuses et linguistiques de Suisse", Demos, No. 3-4, 1998, Neuchâtel, 1999, pp. 26 ff.

[25] OFS, op. cit. (note 20 above), pp. 421 ff.

[26] See Marcel Heiniger, "Daten zu Muslimen und Musliminnen in der Schweiz", in TANGRAM, 7/99, pp. 79 ff.

[27] Sixty-five to 70 per cent of Muslims living in Switzerland are of Turkish origin.

[28] 1998 Annual report of the "Ensuring the Future of Swiss Travellers" Foundation, p. 9, under the title "Gens de voyage". See also TANGRAM, 3/97.

[29] See, in this regard, the observations made by the Swiss delegation during the presentation of the initial report to the Committee on 3 March 1998, as well as the arguments developed by the Federal Council in its message of 30 January 1991 on the accession of Switzerland to the two 1966 Covenants (FF, 1991, I, 1130, 1131 and 1135).

[30] In this field, the first instrument to come into force in the 1980s was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (RS 0.105, came into force for Switzerland on 26 June 1987). See also, in the same field, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which entered into force for Switzerland on 1 February 1989 (RS 0.106).

[31] RS 0.103.1 (RO, 1993, 725) and RS 0.103.02 (RO, 1993, 750). Among the many works devoted to the Covenants, see in particular Walter Kalin, Georgio Malinverni and Manfred Nowak, Die Schweitz und die UNO-Menschenrechtspacte, 2nd ed., Basel, Frankfurt, 1997.

[32] See paragraph 13 of the second periodic report on the second Covenant submitted by Switzerland to the Human Rights Committee, dated 17 September 1998 (CCPR/C/CH/98/2). See also ATF 123, I, 31, 38; 124, I, 92, 94; 124, I, 185, 189. On the other hand, the Federal Court has taken the view that the obligations Switzerland has contracted in ratifying the first Covenant have a programmatic value and need to be given legislative effect. Thus these obligations do not, in principle, provide the basis for rights that can be legally invoked by the individual (see in particular ATF, 122 I, 97, 103; 123, II, 472, 478).

[33] RS 0.103.22.

[34] See also, paras. 328 and 329 below.

[35] RS 0.107.

[36] RS 0.108.

[37] RS 0.101.

[38] Switzerland ratified the ECHR of 4 November 1950 on 28 November 1974. On the subject of the ECHR and its importance for Switzerland, see in particular Mark E. Villiger, Handbuch der Europaischen Menschenrechtskonvention, 2nd ed., Zurich, 1999, and Arthur Haefliger and Frank Schurmann, Die Europaische Menschenrechtskonvention und die Schweiz, 2nd ed., Bern, 1999.

[39] See the message from the Federal Council (FF, 1997, I, 1105 ff.) and the Federal decree of approval (FF, 1997, I, 1121).

[40] See the Federal Council's message of 19 November 1997 (FF, 1998, 1033 ff). The text thus confers on the Council of Europe the possibility and the obligation to set up in the States parties to the Convention a monitoring system aimed at guaranteeing observance of the rights for which it provides, in particular the right of national minorities to equality of treatment, the right to free development of their culture, freedom of assembly and conscience, religious freedom, free access to the media, the right to use their own language in public life and the right to maintain contacts without interference across frontiers.

[41] Switzerland associates itself with many actions undertaken by international organizations to strengthen the protection of minorities and thereby - directly or indirectly - to thwart racists' manoeuvres. In this connection, see para. 74 below.

[42] In February 1996, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment made its second regular visit to Switzerland and inspected, in the various cantons, some 30 establishments used for police custody, pre-trial detention, imprisonment and psychiatric care and as shelters for asylum-seekers (in this connection, see also the second periodic report on the second Covenant, submitted by Switzerland to the Human Rights Committee and dated 17 September 1998 (CCPR/C/CH/98/2, para. 86)).

[43] Message of 19 November 1997 concerning the Framework Convention for the Protection of National Minorities.

[44] In the Council of Europe, Switzerland participated in the work of the Steering Committee for Human Rights (CDDH) and the Committee of Experts for the Development of Human Rights (DH-DEV). These two bodies worked intensively on the draft of the 12th additional Protocol to the ECHR, aimed at broadening in a general fashion the field of application of article 14 of the latter Convention (CM [2000] 53 and addendum of 6 April 2000). The draft, finalized by the CDDH on 9 and 10 March 2000, was finally adopted by the Ministers' Delegates at their 707th meeting held in Strasbourg on 26 April 2000 (see notes (2000) 259).

[45] The ICTY has jurisdiction for prosecuting persons presumed responsible for having committed or ordered serious violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and of the 1907 Hague Convention, or crimes against humanity or acts of genocide on the territory of the former Yugoslavia since 1 January 1991.

[46] The ICTR has jurisdiction to try persons presumed responsible for acts of genocide or other serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan citizens presumed responsible for such acts or violations on the territory of neighbouring States in the course of 1994, crimes that resulted in a million victims among the Tutsi minority.

[47] Federal Decree of 21 December 1995 concerning cooperation with the international tribunals responsible for prosecuting serious violations of international humanitarian law (RS 351.20).

[48] ATF, 123, II, 175.

[49] The legal bases for the jurisdiction of the military courts are to be found in particular in the above-mentioned Federal Decree (see note 47 above), in CP article 8 together with CPM articles 2 and 108 (1) and (2) as well as in article 3 common to the four Geneva conventions of 12 August 1949 (RS 0.518.12 [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field], RS 0.518.23 [Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Armed Forces at Sea], RS 0.518.42 [Geneva Convention relative to the Treatment of Prisoners of War] and RS 0.518.51 [Geneva Convention relative to the Protection of Civilian Persons in Time of War]).

[50] FF, 1999, 4911.

[51] The NFC was accepted on 18 April 1999 by 969,310 votes (59.2 per cent) to 669,158 (40.8 per cent) - with 36 per cent of the electorate voting - and by 12 cantons and 2 demi-cantons to 8 cantons and 4 demi-cantons (FF, 1999, 5306); it entered into force on 1 January 2000 (RO, 1999, 2555 et seq.; RS 101).

[52] See the voluminous (over 600 pages) message of the Federal Council, dated 20 November 1997, concerning a new federal constitution (FF, 1997, I, 1).

[53] See paras. 42 et seq. below.

[54] RS 311.0.

[55] RS 321.0.

[56] FF, 1994, II, 1419 ff.; FF, 1994, V, 531. See para. 94 below.

[57] Message from the Federal Council of 21 September 1998. See also para. 128 below.

[58] Paragraph 12 of the message (see note 57 above).

[59] See para. 126 below.

[60] Swiss Civil Code of 10 December 1907 (RS 210).

[61] RS 173.110

[62] RS 142.31

[63] See paras. 62 et seq. below.

[64] RS 142.20.

[65] RO, 1999, 1111, 2253; FF, 1996, II, 1.

[66] See in particular paras. 228 et seq. below.

[67] RS 131.212.

[68] RS 131.224.1.

[69] Neuchâtel, St. Gallen, Schaffhausen, Graubünden, Vaud, Basel-Stadt, Fribourg and Zurich.

[70] See paras. 109 et seq. below.

[71] Some 24 published and 23 unpublished decisions (on this subject, see also the second periodic report concerning the second Covenant submitted by Switzerland to the Human Rights Committee, dated 17 September 1998 (CCPR/C/CH/98/2, para. 13)).

[72] See Paul Richli, Berufsverbot für Primarlehrerin wegen eines islamischen Kopftuchs? Annotations to ATF 123, I, 296, in ZBJV, 134 (1998), pp. 228-230.

[73] ATF, 125, I, 347 ff.

[74] ATF, 123, I, 296.

[43] Message of 19 November 1997 concerning the Framework Convention for the Protection of National Minorities.

[44] In the Council of Europe, Switzerland participated in the work of the Steering Committee for Human Rights (CDDH) and the Committee of Experts for the Development of Human Rights (DH-DEV). These two bodies worked intensively on the draft of the 12th additional Protocol to the ECHR, aimed at broadening in a general fashion the field of application of article 14 of the latter Convention (CM [2000] 53 and addendum of 6 April 2000). The draft, finalized by the CDDH on 9 and 10 March 2000, was finally adopted by the Ministers' Delegates at their 707th meeting held in Strasbourg on 26 April 2000 (see notes (2000) 259).

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[54] RS 311.0.

[55] RS 321.0.

[56] FF, 1994, II, 1419 ff.; FF, 1994, V, 531. See para. 94 below.

[57] Message from the Federal Council of 21 September 1998. See also para. 128 below.

[58] Paragraph 12 of the message (see note 57 above).

[59] See para. 126 below.

[60] Swiss Civil Code of 10 December 1907 (RS 210).

[61] RS 173.110

[62] RS 142.31

[63] See paras. 62 et seq. below.

[64] RS 142.20.

[65] RO, 1999, 1111, 2253; FF, 1996, II, 1.

[66] See in particular paras. 228 et seq. below.

[67] RS 131.212.

[68] RS 131.224.1.

[69] Neuchâtel, St. Gallen, Schaffhausen, Graubünden, Vaud, Basel-Stadt, Fribourg and Zurich.

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[72] See Paul Richli, Berufsverbot für Primarlehrerin wegen eines islamischen Kopftuchs? Annotations to ATF 123, I, 296, in ZBJV, 134 (1998), pp. 228-230.

[73] ATF, 125, I, 347 ff.

[74] ATF, 123, I, 296.

[75] See, in particular, question by Suter ("Combating the rise in anti-Semitism: need to act") of 3 March 1997 (N 97.3054); urgent question by the Socialist group of 4 March 1997 (N 97.3046); and question by Loeb of 14 December 1998 (N 98.3574).

[76] See paras. 218 et seq. below.

[77] Federal Council's response of 9 June 1997 to the Bühlmann motion ("Chair for research into anti-Semitism and racism") of 20 March 1997 (N 97.3145).

[78] FF, 1997, I, 1105-1136.

[79] On the importance of OFC article 116 regarding the freedom of language, see also Häfelin and Haller, Schweizerisches Bundesstaatsrecht, Nos. 632a, 1257, 1258 and 1260 et seq.

[80] RS 441.3.

[81] FF, 1995, II, 1185-1204.

[82] See para. 177 below.

[83] See the unanimous adoption of the Federal Decree of 13 December 1996 on the historical and legal investigation into the fate of assets which reached Switzerland as a result of the advent of the National-Socialist regime (RS 984; RO, 1996, III, 3487).

[84] A chronology of the historical research and a list of the official documents and reports, i.e. a detailed account of the "Bergier report", can be found on the Internet (http://www.parlement.ch).

[85] "Unclaimed assets" are understood to mean assets belonging to persons who did not contact the banks after the war or who could not do so because they were victims of the Holocaust at the hands of the German National Socialist regime.

[86] The investigations alone cost some 800 million Swiss francs.

[87] The actual sums identified were much lower than the complainants had expected. The two major banks, UBS and Credit Suisse, had agreed, as of August 1998, a lump sum settlement of 1.8 billion francs, thereby satisfying all claims.

[88] See, in particular, the second report on Switzerland, paras. 19 et seq., of 18 June 1999 under the country-by-country approach of the European Commission against Racism and Intolerance.

[89] Leimgruber, Meier and Sablonier, "Das Hilfswerk für die Kinder der Landstrasse", federal archives, file 9, Bern, 1998; see also Année politique suisse 1998, p. 290.

[90] On 7 October 1994, following a 1991 parliamentary initiative, Parliament decided to create the Foundation. See also para. 293 below.

[91] Annual report for 1998 of the "Ensuring the Future of Swiss Travellers" Foundation, p. 3.

[92] See para. 262 below.

[93] RS 823.21.

[94] For further details, see paras. 81 et seq. and paras. 270 et seq. below.

[95] RS 142.31. After the successful referendum campaign against the new Asylum Act, the Swiss people voted, on 13 June 1999, in favour of the introduction of revised legislation. On the same day, the people also had to decide whether to adopt the federal decree on urgent measures relating to asylum and foreigners, which had entered into force on 1 July 1998 and which anticipated a number of measures provided for under the new Act.

[96] Before the completely revised Asylum Act entered into force, the authorities had one instrument at their disposal: temporary collective admission, a measure which could be taken when return was not feasible or to grant refugee status also to persons who were not directly subject to persecution. On 7 April 1999, the Federal Council decided to apply this measure, for the last time, to nationals of the former Yugoslavia who had been living in Kosovo. The Federal Council rescinded the measure on 11 August 1999.

[97] RS 0.142.30.

[98] At the request of the cantons and because there are hardship cases meeting the prescribed criteria, the following groups of people, who entered Switzerland before the end of 1992, are eligible for temporary admission: 5,294 people whose application for asylum is pending at first instance; 944 people whose appeal is pending before the Swiss Asylum Appeals Commission (CRA); 6,500 people whose application was rejected but who have not been deported. In addition, there are 100-200 seasonal workers and holders of short-term residence permits from the former Yugoslavia who had applied for asylum before 30 April 1996 when authorization for them to stay was withdrawn after the end of the war in Bosnia; 100-200 people who had withdrawn their asylum application in order to get authorization from the cantons as hardship cases and who could then no longer benefit from this authorization because of their dependence on aid; finally, several dozen foreigners whose residence status was temporarily regulated for humanitarian reasons in the framework of the Bosnia and Herzegovina campaign.

[99] See OFS, op. cit. (note 10), pp. 20 ff., as well as the updated statistics of the ODR on the Internet, http://www.asyl.admin.ch.

[100] According to figures provided by UNHCR for 1999, Switzerland is the country that has accepted the greatest number of asylum-seekers in proportion to its population (6.5 per 1,000 habitants). Belgium came second with 3.5 asylum-seekers per 1,000 habitants, and the Netherlands and Austria joint third, each with 2.5 asylum-seekers.

[101] See Revue du Corps Suisse d'aide en cas de catastrophes, 4/99, annex p. 1.

[102] Since 1991, humanitarian aid for the former Yugoslavia has cost the Confederation some Sw F 260 million. This figure does not include the Sw F 120 million which the ODR has invested locally for returnee assistance programmes in Bosnia and Herzegovina (Sw F 96 million) and Kosovo (Sw F 6 million). Also not included in this figure is the cost of participation by the Swiss air force in operation "Alba", whereby relief goods were delivered by helicopter to refugees in Albania in the spring and summer of 1999.

[103] Reply by the Federal Council to the motion of the Political Institutions Commission of the Council of States (97.060) ("Aeby minority") of 3 March 1999, concerning the complete revision of the LSEE (99.3035).

[104] Concerning the CFE, see also paras. 227 et seq. below.

[105] The corresponding amendment to the LSEE entered into force on 1 October 1999.

[106] Ordinance No. 2 concerning asylum (funding) of 11 August 1999 (RS 142.312).

[107] Fankhauser parliamentary initiative (No. 98.445).

[108] In this connection, see also Federal Council report on Swiss human rights policy (reply to Baumlin parliamentary motion of 17 December 1997 (No. 97.3621)) annexed.

[109] See second report on Switzerland of 18 June 1999, adopted by ECRI at its twentieth general assembly, held in Strasbourg from 7 to 10 December 1999, which was submitted to the Committee of Ministers of the Council of Europe at its 694th meeting on 19 June 2000.

[110] See initial report of Switzerland, paras. 50 et seq.

[111] OFC article 4 guaranteed that "all Swiss citizens are equal before the law". As early as 1888, the Federal Court had extended the scope of that provision to foreigners, without restricting it to persons residing in Switzerland (ATF, 14, 489 et seq.).

[112] Jörg Paul Müller, Grundrechte in der Schweiz, 3rd ed., Bern, 1999, pp. 396 ff., Walter Kälin and Martina Caroni, "Das verfassungsrechtliche Verbot der Diskriminierung wegen der ethnisch-kulturellen Herkunft", in Walter Kälin (ed.) Das Verbot ethnische-kulturellen Diskriminierung: Verfassungs-und menschenrechtliche Aspekte, Basel, Geneva, Munich, 1999, pp. 67-94, in particular p. 68.

[113] Among the many references, ATF, 123, I, 1, preambular para. 6 (a), p. 7; 121, I, 129, pream. para. 4 (d), pp. 134 ff.

[114] See Georg Müller, "Article 4", in Jean-François Aubert et al. (ed.), Commentaire de la Constitution Fédérale de la Confédération suisse du 29 mai 1874, Basel et al., 1987, as well as subsequent additions, Nos. 30 and 39.

[115] J.P. Müller, op. cit. (note 112 above), pp. 396 ff.

[116] Message of the Federal Council of 2 March 1992 concerning Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination and the related amendments of criminal law (FF, 1992, III, 265 ff., para. 521; J.P. Müller, op. cit. (note 112 above), pp. 447 ff.

[117] Whereas the obligation of equality before the law expresses the positive aspect of equal treatment ("Everyone is equal before the law" NFC, art. 8 (1)), the prohibition of discrimination NFC, (art. 8 (2)) covers its negative side.

[118] Article 8 of the Ordinance of 6 October 1986 limiting the number of foreigners (OLE), RS 823.21. The report of the Federal Council on policy towards refugees and foreigners had announced its policy (FF, 1991, III, 327). See ATF, 122, II, 113, 115 et seq., Andreas Auer, "Constitution et politique d'immigration, la quadrature des trois cercles", in AJP PJA (Pratique juridique actuelle), 1996, pp. 1,230 ff.

[119] See Kälin Caroni, "Das verfassungsrechtliche Verbot der Diskriminierung wegen der ethnisch-kulturellen Herkunft", loc. cit. (note 112 above), pp. 80 ff.

[120] The amended article 8 of the OLE entered into force on 1 November 1998 (RO 1998, p. 2,726). On the basis of OLE article 8 (1), a residence permit for a first paid job may be granted only to nationals of EU or EFTA countries. Persons from other countries may be recruited on an exceptional basis only, provided they have special qualifications that are clearly essential for a particular task.

[121] See also para. 270 below.

[122] See message of 2 March 1992 concerning Switzerland's accession to the Convention (FF, 1992, III, 265 ff., para. 54).

[123] See, for example, ATF, 123, II, 472 et seq. on OLE articles 13 (b) and 28 (1) (a) and (b) concerning the conversion of seasonal permits into annual permits, and the question of the legality and constitutionality of the new regulations on conditions of conversion (pream. paras. 3 and 4 (b); confirmation of case law). The Federal Court found that the decision on the conversion of permits for nationals of non-member States of EFTA or EU is in conformity with the treaties concluded by Switzerland: there is violation neither of the prohibition of discrimination pursuant to ECHR article 14 or first Covenant article 2 (2) (pream. para. 4 (c) and (d)), nor of the principle of equality before the law pursuant to second Covenant article 26 (pream. para. 4 (d)) nor of the Convention (pream. para. 4 (e)).

[124] G. Müller, loc. cit. (note 114 above, No. 26).

[125] "A provision of private law forbidding individuals to establish in their private relations distinctions based on racial discrimination would encounter considerable problems of practical application, since it would be very difficult to produce proof of such behaviour" (message, p. 286).

[126] See Häfelin and Haller, loc. cit. (note 79 above), Nos. 1,105 et seq.

[127] Martin Philipp Wyss, "Gesetzgeberische Massnahmen zum Abbau von Diskriminierungen - Handlungsbedarf und Modelle für die Schweiz?", in Walter Kälin (ed.), Das Verbot ethnisch-kultureller Diskriminierung, RDS (Revue de droit suisse), fascicle 29, Basel/Frankfurt, 1998, pp. 115 ff. and 133.

[128] This solution links up with the law on equality (LEg, art. 9).

[129] Unpublished decision of the Federal Court of 7 March 1995 (printed in "Mietrechtspraxis", Zeitschrift für schweizerisches Mietrecht, 1997, pp. 155 ff.).

[130] See, on this subject, the replies of the Federal Council to the simple question by Hollenstein (CN)(97.1031) of 20 March 1997 and the parliamentary question by the Socialist group (99.3015) of 1 March 1999.

[131] Formerly Federal Office for External Economic Affairs (OFAEE).

[132] RS 311.0.

[133] RS 321.0.

[134] FF, 1993, II, 868.

[135] FF, 1994, II, 1416 f.; FF, 1994, V, 521 and 523. With a turnout of 45.9 per cent, 1,132,662 people voted in favour of the bill and 939,975 against (see also OFS, Miroir statistique de la Suisse, 1996, pp. 378 ff.).

[136] BO CN, 1999, p. 109. See also Keller question ("Racism. Application of the criminal provision", CN 94.3375), question by the Swiss Freedom Party group of 17 March 1999 ("Racism. Abusive complaints", CN 99.3092).

[137] Scherrer motion: "Abrogation of the law on racism" of 21 April 1999 (CN 99.3169).

[138] Morgeli motion: "Dissolution of the Federal Commission against racism" of 22 December 1999 (CN 99.3645); see, on this subject, para. 219 below.

[139] In the preliminary examination, the Federal Chancellery decided to change the title of the referendum (FF, 1998, 2177 et seq.). The initiative committee lodged an administrative appeal with the Federal Court: originally, the committee had wanted the title to simply be "For freedom of speech". The Federal Chancellery found that the only measure expressly specified at the beginning of the text of the initiative (abolition of CP article 261 bis) was not included in the title and that, consequently, what was, according to the authors, a decisive element was missing. Hence the risk that an unprejudiced reader would be misled by reading only the title (see decision of the First Public-Law Court of the Federal Court of 30 March 1998 (1A.314/1997/boh)).

[140] FF, 1998, 2177-2189.

[141] FF, 1999, 8892.

[142] The survey on anti-Semitism was commissioned by Coordination intercommunautaire contre l'antisémitisme et la diffamation (CICAD) in Geneva and the American Jewish Committee (AJC) of New York. In January 2000, the GfS polling institute questioned by telephone 1,210 representative persons in German-speaking and French-speaking Switzerland.

[143] Marcel A. Niggli, Rassendiskriminierung: Ein Kommentar zu Art. 261 bis StGB und Art. 171 (c) MStG, Zurich, 1996 (Racial Discrimination: a commentary on CP, article 261 bis and CPM, article 171 (c)). In 1999, a supplement was published by the Société pour les minorités en Suisse (GMS) and the Fondation contre le racisme et l'antisémitisme (GRA), Rassendiskriminierung, Gerichtspraxis zu Art. 261 bis StGB, Analysen, Gutachen und Dokumentation der Gerichtspraxis 1995-1998; see also Alexandre Guyaz, L'incrimination de la discrimination raciale, thesis, Lausanne, 1996; Karl-Ludwig Kunz, "Neuer Straftatbestand gegen Rassendiskriminierung - Bemerkungen zur bundesräthlichen Botschaft", in Schweizerische Zeitschrift für Strafrecht 109, 1992, pp. 154 et seq.; Jörg Rehberg, Strafrecht IV: Verbrechen gegen die Allgemeinheit, 2nd ed., Zurich, 1996; Günter Stratenwerth, Schweizerisches Strafrecht, primarily part II: Straftaten gegen Gemeininteressen, 4th ed., Bern, 1995, para. 39, Nos. 21 et seq., as well as Stefan Trechsel, Schweizerisches Strafgesetzbuch, Kurzkommentar, 2nd ed., Zurich, 1997.

[144] In the past, it was not clear whether CP, article 261 bis protected public order, as much of the legal writings contended (see message and also initial report, para. 66; see also Kunz, loc. cit., Trechsel, op. cit.; Stratenwerth criticism, op. cit.), or human dignity (Niggli, op. cit.; Rehberg, op. cit.).

[145] For an in-depth overall view, see the chronology by H. Stutz, on the Internet at the address http://www.gra.ch. See also paras. 301 et seq. below.

[146] In October 1996, the first commentary appeared on the application of CP, article 261 bis and CPM, article 171 (c) (see Niggli, op. cit., note 143 above), then in 1999 the supplement on case law 1995-1998 (ibid.).

[147] Summary judgement of the examining judge of the Northern Vaud District of 28 May 1998.

[148] See in particular the judgements of Basel-Stadt correctional court of 17 March 1998 and 22 April 1998 (Hitler salute).

[149] See in particular the judgements of the Vaud cantonal court of 8 June 1998 and the Vevey district correctional court of 8 October 1997 (Les mythes fondateurs de la politique israélienne), and also the summary judgement of the Procurator-General of the canton of Geneva of 14 August 1997 (also because of this book).

[150] See in particular the summary judgement of the Schaffhausen examining judge of 18 March 1997.

[151] In particular, the decision of the criminal supervising authority of the District of Uster of 14 July 1995.

[152] See in particular the judgement of the Zurich district court of 16 February 1998.

[153] In particular, the summary judgement of the examining judge of the District of St. Gallen of 10 March 1998.

[154] The press reported regularly on the proceedings (see, for example, Neue Zürcher Zeitung (NZZ) of 6 July 1995, 10 April 1996, 12 March 1998, 17 July 1998, 22 July 1998, 24 July 1999, 30 December 1999 and 27 April 2000).

[155] Decision 6S.719/1999 of 22 March 2000.

[156] See paras. 301 et seq. below.

[157] Decision of the Court of Criminal Cassation of the Federal Court of 10 August 1999 (6S.810-813/1998).

[158] "When an offence is committed by means of the press and perpetrated by the publication itself, the author of the piece shall be solely responsible for it ..." (CP, art. 27 (1)).

[159] Decision of the Court of Criminal Cassation of the Federal Court of 3 November 1999 (6S.186/1999).

[160] Decisions of the Court of Criminal Cassation of the Federal Court of 3 March 2000 (6P.132/1999 and 6S.488/1999).

[161] See also para. 107 above.

[162] See in particular Fredi Hänni, "Die Schweizerische Anti-Rassismus-Strafnorm und die Massenmedien", thesis, Bern, 1996, and, by the same author, "Rassendiskriminierung im Strafrecht: Eingrenzungen nötig", in Plädoyer 4/1997, pp. 28 ff.

[163] See message of the Federal Council concerning amendment of the Criminal Code and the Military Criminal Code (FF, 1997, III, 269 et seq.).

[164] See, in this connection, the explanations provided in Switzerland's second periodic report to the Human Rights Committee, dated 29 September 1998 (CCPR/C/CH/98/2, paras. 134 et seq.).

[165] FF, 1998, 1253 et seq.

[166] FF, 1998, 3689 et seq.

[167] See Switzerland's second periodic report to the Human Rights Committee, dated 29 September 1998 (CCPR/C/CH/98/2, paras. 137 et seq.).

[168] See para. 126 above.

[169] See, for example, ATF, 123, II, 175.

[170] RS 161.1.

[171] RS 161.5.

[172] See explanations in paras. 144 et seq. below.

[173] At the federal level, no other grounds are admitted for deprivation of civic rights. The cantons remain free to invoke other grounds with regard to the right to vote in cantonal and communal elections.

[174] This restriction had historical origins, going back to the days of interdenominational conflict. It was criticized in legal writings and could no longer be justified.

[175] One of the main innovations in the new cantonal constitution adopted by the Grand Council of Neuchâtel on first reading in March 2000 is that it grants the right to vote in cantonal matters to foreigners who have been resident in the canton for at least five years (see NZZ of 11 and 12 March 2000).

[176] Only foreigners who have resided in Switzerland for 10 years, at least 5 of which have been in the commune, are allowed to vote.

[177] See Année politique suisse 1998, p. 27. In a referendum in 1996, the people had rejected a similar decision by Parliament (Année politique suisse 1996, p. 23).

[178] See paras. 174 et seq. below.

[179] RS 177.221.10.

[180] See, for example, ATF, 123, II, 511; 122, II, 373; and 121, II, 296.

[181] See, for example, ATF, 124, II, 289, and 122, II, 433.

[182] RS 141.0.

[183] Häfelin and Haller, loc. cit. (note 79 above), Nos. 522 et seq.

[184] Twelve years, or, in some cases, five years (LN, art. 15).

[185] The possibility of putting this mandate into effect by revising the nationality law is currently being considered: this would allow Switzerland to withdraw its reservation to art. 7 of the Convention on the Rights of the Child of 20 November 1989 (RS 0.107). See position taken by the Federal Council on the Berberat motion of 22 December 1999 ("United Nations Convention on the Rights of the Child: withdrawal of reservations" (CN, 99.3627)).

[186] Rapport sur le programme de la législature 1999-2003, of 1 March 2000, p. 28 (FF, 2000, 2168 et seq.).

[187] OFS, op. cit. (note 10 above), pp. 26 ff.

[188] The naturalization rate is the number of persons naturalized in a given year for every 100 foreign nationals resident in Switzerland (on a yearly or permanent basis) at the beginning of the year.

[189] To relate this figure to the various nationalities of origin, some examples can be given: around 80 per cent of Italians, two thirds of Spaniards and about half of Germans and Turks living in Switzerland are in this situation. Again in relation to nationality of origin, it can be observed that in 1998 Italians topped the list of naturalizations, with 5,600 persons, followed by nationals of the countries that emerged after the breakdown of the former Yugoslavia (OFS, op. cit. (note 10 above), p. 27, fig. A.8.1).

[190] See OFS, Miroir statistique de la Suisse 2000, table T.1.26.

[191] New nationality law in force since 1 January 1992.

[192] From 1991 to 1996, the Netherlands granted the highest number of naturalizations in proportion to size of population. Statistically, three quarters of all foreigners in the country in 1991 had been naturalized by the end of 1996. Sweden and Norway had comparable naturalization rates. In the same period, only Germany had an average annual naturalization rate lower than Switzerland's (1.2 per cent; see, in this connection, OFS, op. cit. (note 187 above), p. 27, fig. A.8.3).

[193] See explanations in para. 222 below.

[194] See Federal Council's position on the Hübmann motion (98.3582).

[195] See Federal Council's position on the parliamentary questions from the National Council on 20 March 2000 concerning the popular vote in the commune of Emmen (Lucerne), on 12 March 2000, when 19 of the 23 applications for naturalization were rejected. This case was the focus of nationwide attention (see NZZ of 21 and 22 March 2000). The Federal Council expressed concern and disappointment at the result of the vote (see also para. 222 below).

[196] Message of 15 November 1995 concerning the revision of the Swiss Civil Code (civil status, marriage, divorce, right to filiation, alimony, family shelters, guardianship and arranged marriage) (FF, 1996, I, 1 et seq.).

[197] The guarantees provided by NFC article 14 and ECHR article 12 also apply, on principle, to foreigners. Article 44 of the Federal Act concerning Private International Law of 18 December 1987 (RS 291) provides that the requirements for marriage under Swiss law are normally applicable, but, even if they are not met, a marriage between foreigners may be performed provided that the requirements set by the legislation of the country of one of the betrothed are met.

[198] See, for example, ATF 124, II, 361 (rejection of family reunification for a foreign national's children from a previous relationship; confirmation of case law whereby the children of foreign parents who are separated only have the right to family reunification if the parent living in Switzerland is their preferred family relative); 122, II, 1; 120, Ib, 1. The European Court of Human Rights has had occasion to examine this case law and found that Switzerland had not breached ECHR article 8 in turning down an application for family reunification in the case of the child of parents who only had a humanitarian permit to live in Switzerland (decision in the case of Gül v. Switzerland, of 19 February 1996, Rec. 1996-1, No. 3).

[199] ATF, 120, Ib, 257: the protection afforded by ECHR article 8 would be too far-reaching if adult children who are able to provide for themselves could invoke this article to claim the right to live in their parents' household and obtain a residence permit in this way.

[200] RS 211.412.41.

[201] RS 824.0. See also NFC article 59 (Military service and alternative service).

[202] There were still 259 convictions in 1995 (including 117 involving persons refusing to serve for moral reasons); on the other hand, there were only 96 in 1996 (including 48 involving persons refusing to serve for the same reasons). In 1997, this figure fell to 42 (including 2 cases for a similar refusal). There has also been a decrease in the number of applications to perform unarmed military service (287 in 1998 and 273 in 1999).

[203] Häfelin and Haller, loc. cit. (note 79 above), Rz. 1224 et seq.; Jean-François Aubert, Bundesstaatsrecht der Schweiz, vol. II, Basel - Frankfurt, 1994, No. 2027, p. 910.

[204] See Hans Mahnig, "L'intégration institutionnelle des Musulmans en Suisse", address given on 18 January 2000 at the symposium of the Federal Commission against Racism.

[205] See note 69 above.

[206] See decision Urteil der II. öffentlichrechtlichen Abteilung vom 7. Mai 1999 i.S. Abd-Allah Lucien Meyers v. Gemeinde Hausen a.A. und Regierungsrat des Kantons Zürich (2P.361/1997); see also EuGRZ, 1999, p. 607.

[207] The referendum against this enactment was requested on 9 July 1998 and took place on 29 November 1998; the proposal was accepted by 63.4 per cent of voters (FF, 1999, 7).

[208] RS 822.11.

[209] ATF, 125, I, 347.

[210] ATF, 116, Ia, 252.

[211] ATF, 119, Ia, 178.

[212] ATF, 123, I, 296.

[213] ATF, 96, I, 219; 96, I, 586.

[214] ATF, 108, Ia, 277, and ATF, 107, Ia, 305.

[215] See, in this connection, the initial report of Switzerland, para. 131.

[216] See para. 186 above.

[217] SPJ, 1998, p. 29.

[218] The presence of social purposes in the Constitution gave rise to 95 subjects of contention between management and labour and the major political parties when the text reached the consultation stage. See, in this connection, the message of the Federal Council of 20 November 1996 relating to a new Federal Constitution (FF, 1997, I, 16, 199 et seq.).

[219] Articles 19, 22 and 40 of the 1977 Constitution of the Canton of Jura.

[220] The optional referendum having been called for on 3 February 2000 by opponents of the bilateral agreements, these instruments were put to the popular vote on 21 May 2000 and adopted, with 67.8 per cent of votes in favour, (48 per cent turnout).

[221] See Eymann motion of 8 October 1999 (CN 99.3541) and response of the Federal Council of 21 January 2000.

[222] RS 235.1.

[223] See Christiane Brunner, Jean-Michel Bühler and Jean-Bernard Waeber, Commentaire du contrat de travail, 2nd ed., Lausanne, 1996, notes 6-8 on CO article 320, related to notes 3 and 4 on CO article 328 (b); see ATF, 120, II, 118 et seq.

[224] Ullin Streiff and Adrian von Kaenel, Leitfaden zum Arbeitsvertragsrecht: der Arbeitsvertrag OR 319-362 mit Kommentaren für Lehre und Praxis, 5th ed., Zurich, 1992, note 10 on CO article 320; see ATF, 122, F, 267.

[225] OFS, op. cit. (note 10 above), pp. 40 ff.

[226] The median wage corresponds to the wage exceeded by that earned by half of all workers, whereas the other half does not reach this amount. In the standardized (median) wage, the income of part-time workers has been converted into equivalent full-time remuneration.

[227] The freedom to form or join trade unions is further guaranteed by ILO Convention No. 87 concerning freedom of association and protection of the right to organize, which has been in force since 25 March 1976 (RO, 1976, pp. 689 ff.), and ILO Convention No. 151 concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service, in force since 3 March 1982 (RO, 1982, p. 334).

[228] The elected representatives of workers also enjoy increased leave benefits under CO article 336 (2) (b).

[229] RS 822. 14.

[230] FF, 1997, I, 179.

[231] ATF, 125, III, 277.

[232] Article 23 of the Civil Service Statutes (RS 172.221.10) and article 25 of the Employees' Regulations (172.221.104).

[233] The new Confederation Personnel Act of 24 March 2000 (FF, 2000, 2105) contains in article 24 (1) a provision concerning the right to strike: if State security, the protection of important interests governed by external relations or guaranteeing supplies of vital goods and services so requires, the Federal Council may limit or suppress the right to strike in the case of certain categories of employees.

[234] Raggenbass motion of 8 October 1999 (No. 99.3551) "Limiting asylum-seekers' access to care".

[235] RS 142.312.

[236] Decision I, 259/99 of 15 October 1999.

[237] In other decisions, the Federal Court defined the scope and limits of this fundamental right (see, for example, ATF, 122, II, 193, and 122, I, 101).

[238] See recommendation R (2000) 3, adopted on 19 January 2000 by the Council of Ministers (Recommendation R (2000) 3 of the Committee of Ministers to Member States on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship).

[239] As regards the practice of the courts, see paras. 104 et seq. above.

[240] See the dismissal order of 10 July 1998 issued by the Public Prosecutor's Office of the district of Zurich. Infringement of CP article 261 bis (4) and (5): refusal to sell a cinema ticket to a black person. As regards paragraph 5, the defendant maintained that her refusal was motivated not by the colour of the complainant's skin, but by his generally obstreperous demeanour, such that she would not have sold a ticket to anyone behaving in that manner. The case, therefore, did not constitute a refusal of service on racial grounds and ended with dismissal.

[241] As regards the Convention, see for example Jochen A. Frowein and Wolfgang Peukert, Europäische Menschenrechts-Konvention. EMRK-Kommentar, 2., vollst. Neubearb. Aufl. unter Berücksichtigung des 11. ZP zur Gründung eines ständigen Gerichtshofs, Kehl, 1996; Heribert Golsong, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Loseblattausgabe, Cologne, 1993.

[242] See initial report of Switzerland, para. 169.

[243] "[The Commission shall] concern itself with racial discrimination, work towards promoting better understanding between persons of different race, colour, origin, ethnic or religious affiliations or religion, combat all forms of direct or indirect racial discrimination and attach particular importance to effective prevention."

[244] Parliamentary motion by Mörgeli, 22 December 1999 ("Dissolution of the Federal Commission against racism" (CN 99.3645))

[245] See position taken by the Federal Council on the Mörgeli motion of 22 December 1999.

[246] See the Commission's annual reports for the years 1997 to 1999. Other Commission projects are mentioned in the present report at the relevant point.

[247] See TANGRAM, 3/97, pp. 53 ff. The campaign received the Golden United Nations Award.

[248] Published in TANGRAM, 1/96.

[249] See para. 243 below.

[250] See also the position adopted by the Federal Council on the Mörgeli motion (notes 244 and 245 above).

[251] The secretariat of the Commission (28 people) was already administratively attached to the OFE through the coordination service for integration issues. The CFE nonetheless retains the status of an extra-parliamentary commission.

[252] The OFE is already responsible for the registration of foreigners, assessment of the labour market, the unblocking of federal quotas, visa questions, advice to immigrants, naturalization applications and nationality questions, and also the implementation of policy on foreigners and associated legislation.

[253] See also the Federal Council's position on the motion of 21 December 1999 tabled by the Socialist group ("Integration of foreigners. Information campaign" (CN 99.3617)) and the explanations of the Federal Council on the Socialist group's motion of 21 December 1999 ("Creation of a bureau for the integration of foreigners" (CN 99.3616)).

[254] Report of the Federal Commission for Refugees of 9 January 1998.

[255] See in this connection the Fankhauser parliamentary initiative ("Human rights. Creation of a mediation service"), adopted on 4 October 1999 by 90 votes to 68.

[256] See in this connection the survey of the cantons carried out by the Federal Commission for Refugees.

[257] See in this connection the initial report of Switzerland, paras. 180 et seq.

[258] OFS, op. cit. (note 10 above), p. 42.

[259] Report published by the CFR, "Separate classes? Dossier on political demands for the segregation of children speaking a foreign language in school", August 1999.

[260] CN question No. 98.3656 tabled by Bühlmann on 18 December 1998.

[261] See paras. 46 et seq. above.

[262] The reference to support for the press in the Constitution goes back to the Zbinden motion (CN 93.3558) of 1 December 1993, transmitted on 1 February 1995 in the form of a "postulat" (BO CN, 1995, 269). It had been preceded by various unsuccessful attempts.

[263] Decision of 10 August 1999 by the Criminal Court of Cassation of the Federal Court (6S.810-813/1998), see para. 111 above.

[264] These had to do, in part, with the virulent criticism sparked by the issue of unclaimed assets in some sections of the population (see para. 51 above).

[265] NZZ, 23 December 1999, p. 12, and 8/9 January 2000, p. 14.

[266] Mention may be made here of the statement of 14 February 2000 by the federal police and the recommendations of the Federal Department of Foreign Affairs.

[267] See in this connection the positions adopted by the Federal Council in response to the parliamentary questions by Loeb of 11 June 1998, von Felten of 8 October 1998 and Dormann of 15 March 1998 in the context of the Washington Conference on the Holocaust in December 1998.

[268] The "Internet Monitoring" service of the Federal Office for Police Matters should attempt to develop cooperation with other countries, ensure liaison between the cantonal police bodies, and help both the latter and private individuals in inquiries into cases that have been reported. However, it has no power to institute inquiries; rather it coordinates inquiries between cantons and handles cases that the cantons delegate to it (search for author and site provider, followed if necessary by a recommendation to the cantonal police to close the site).

[269] NZZ, 20 October 1999.

[270] See in this connection the DDC publications list: "Reliable Information".

[271] See paras. 86 et seq. above.

[272] Hafelin and Haller, loc. cit., (note 79 above), No. 1,049.

[273] ATF, 105, II, 49, 57, et seq.

[274] Most recently in ATF, 125, II, 417 et seq. In this decision, the Federal Court recalled that, in the event of jurisdictional conflict, public international law in principle overrides national law, particularly when the provision of public international law aims at the protection of human rights (E. 4c-e).

[275] See in particular ATF, 124, IV, 121; 123, I, 19; 123, II, 472; 123, IV, 202.

[276] JAAC 59 (1995) No. 25, pp. 222, 226 et seq.

[277] For example, ATF, 122, I, 18, 20; 117, Ib, 367.

[278] ATF, 118, IV, 221; 112, IV, 115.

[279] See para. 61 and paras. 81 et seq., above.

[280] See message of 2 March 1992 concerning Switzerland's accession to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (FF, 1992, III, 265 et seq., para. 54).

[281] Question by Dardel of 6 October 1999.

[282] See explanations in para. 158 above.

[283] The canton of Basel-Stadt is the only canton recognizing a right to naturalization: residence for 15 years in the canton, of which the last 5 years must be uninterrupted, gives rise to a right to naturalization. Years between the tenth and twentieth birthdays count double (BüG BS, para. 17).

[284] Nabholz motion of 13 March 2000 ("Facilitated naturalization of young foreigners" [CN 00.3049]); Garbani motion of 15 March 2000 ("Administrative nature of naturalization decisions" [CN 00.3052]); motion by the Socialist group of 15 March 2000 ("Accession of Switzerland to the Council of Europe Convention on Nationality" [CN 00.3054]); Berger question of 20 March 2000 ("Naturalization by the people. Appearance of a democratic act" [CE 00.3077]); motion by the ecologist group of 22 March 2000 ("Introduction of a right to naturalization" [CN 00.3086]); Aeppli motion of 22 March 2000 ("Safeguarding fundamental rights in naturalization procedures" [CN 00.3092]).

[285] In 1999, the rejection of two applications for naturalization by female twins born in Switzerland of parents originating from the former Yugoslavia and living in the commune of Beromünster (canton of Lucerne) had already caused an outcry. The media had criticized the decision of the municipal council (see, inter alia, Zürich Basler Zeitung of 8 and 9 January 2000). In the case of Emmen, the media also adopted a very critical position (see NZZ of 21 and 23 March 2000) and, on 22 March 2000, the Council of Europe's Commission against Racism and Intolerance also criticised the Swiss naturalization procedure.

[286] See NZZ, p. 13, of 21 March 2000.

[287] On 22 March 2000, the Geneva Grand Council submitted a draft cantonal initiative intended to prevent naturalization decisions from being taken by popular vote.

[288] At its meetings on 25 and 26 May 2000, the Political Institutions Commission of the National Council held a hearing on the subject of naturalization. On this occasion, the question of the compatibility of the popular vote in the commune of Emmen with the Convention's provisions was discussed, among other subjects.

[289] See also para. 162 above.

[290] See second periodic report of the Swiss Government to the Human Rights Committee (CCPR/C/CH/98/2, para. 267), of 17 September 1998.

[291] OFS, op. cit. (see note 20 above), chap. 19, table 19.6.

[292] See report to the Federal Council relating to the CPT's visit to Switzerland from 11 to 23 February 1996, para. 16, p. 12.

[293] See para. 57 above.

[294] See annual report for 1998 of the "Ensuring the Future of Swiss Travellers" Foundation, pp. 7 ff.

[295] See para. 56 above.

[296] See paras. 57 et seq. above.

[297] For a statistical overview of the handling of cases of discrimination brought to the attention of the CPR, see para. 225 above.

[298] Rassendiskriminierung Gerichtspraxis zu Art. 261bis StGB. Analysen, Gutachten und Dokumentation der Gerichtspraxis 1995-1998, Zürich, 1999.

[299] Chronology of cases of racism in Switzerland: http://www.gra.ch. This site also offers an updated overview of judgements (substantiated) on violations of CP article 261 bis.

[300] SMS and FRA also operate a free telephone consultation service offering advice in cases of violation of anti-racist legislation. For this purpose, five lawyers can be contacted by telephone, once a week.

[301] In the case of several incidents, only the most serious is indicated.

[302] See note 299 above.

[303] On this subject, see for example the explanations given in Gesellschaft Minderheiten in der Schweiz/Stiftung gegen Rassismus und Antisemitismus (ed.), Ergänzungsband Rassendiskriminierung - Gerichtspraxis zu Art. 261 bis StGB, Zurich, 1999 (see note 298 above), p. 87 (No. 78) concerning the decision of the Zurich Supreme Cantonal Court confirming the decision of the lower court, which had refused to recognize the Jewish religious community of Zurich as an injured party or victim.

[304] See ibid. p. 75 (No. 73) and p. 164 (No. 91).

[305] See Marcel Alexander Niggli, Christoph Mettler and Dorrit Schleiminger "Zur Rechtsstelung des Geschädigten im Strafverfahren wegen Rassendiskriminieung" in Ergänzungsband Rassendiskriminierung - Gerichtspraxis zu Art. 261 bis StGB, op.cit (see note 303 above), pp. 225 ff. and, in particular, pp. 245 ff.

[306] Under CPM articles 180 et seq., violations of the law of nations during armed conflict fall under the Military Criminal Code and, by virtue of CPM article 2 (9) and article 218, are under the jurisdiction of the military.

[307] On this subject see Stefan Wehrenberg "Zur Geltendmachung von Zivilansprüchen durch Opfer von Kriegsverbrechen im Rahmen von Kriegsverbrecherprozessen der schweizerischen Militärjustiz", in Strafrecht als Herausforderung, Jürg-Beat Ackermann (ed.), Zurich, 1999, pp. 497-520.

[308] RS 322.1.

[309] However, only the victims of offences committed after 1 January 1993 who were domiciled or permanently resident in Switzerland at the time of the incidents and who do not receive adequate benefits from a foreign State may be granted compensation and/or moral reparation in accordance with LAVI article 11.

[310] ATF, 122, II, 315, 318.

[311] See position adopted by the Office of Justice on 23 June 1993 (Verwaltungspraxis de Bundesbehörden 1994, No. 65, para. 3).

[312] See paras. 94 et seq. above.

[313] The Foundation against Racism lodged a criminal complaint with the Procurator-General of the canton of Bern opposing the creation of this new party on the grounds that it would constitute a violation of CP article 261 bis.

[314] See message of 2 March 1992 concerning Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination (FF, 1992, III, 265 et seq., para. 613), and the explanations presented in the initial report of Switzerland (para. 68).

[315] At the present time, in the absence of any decision pursuant to CP article 260 ter, it is impossible to say anything about the application in this provision or about the case law of the cantonal courts and the Federal Court.

[316] Müller, Grundrechte in der schweiz, p. 417.

[317] Annual report for 1998 of the "Ensuring the Future of Swiss Travellers" Foundation, p. 2.

[318] On 6 October 1999, the United Nations General Assembly adopted the Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. In the context of its active policy of promoting human rights and equality, Switzerland participated in four meetings of the Working Group responsible for the framing of the Optional Protocol and supported the principles agreed on.

[319] At the present time, Switzerland recognizes the communications procedure of the ECHR vis-à-vis the European Court of Human Rights, and the communications procedure of the Committee against Torture. Recognition of the communications procedure in the framework of the International Convention on the Elimination of All Forms of Racial Discrimination and the first Optional Protocol to the second Covenant has already been mentioned in the "Report on Switzerland's foreign policy during the 1990s" (November 1993) and in the "Programme of the Legislature 1995-1999" (FF, 1996, II, 293 et seq.). Progress should shortly be made in this area (see the "Report on the Programme of the Legislature 1999-2003" of 1 March 2000, annex 2).

**List of abbreviations**

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|---|---|
| AE | European archives |
| AF | Federal decree |
| AFPG | Federal decree of general scope |
| APS | Année politique suisse/Schweizerische Politik, annual publication (since 1965) of the Institute of Political Science of the University of Bern (cited by year and by page) |
| ASDI | Annuaire suisse de droit international (Swiss yearbook on international law) |
| ATF | Arrêts du Tribunal fédéral suisse (Decisions of the Swiss Federal Court) |
| AUE | Single European Act (JO CE L 169/1 (1987)) |
| BO - CN CE | Bulletin officiel de l'Assemblée fédérale, National Council Council of States (until 1962: CN/CE stenographic bulletin) |
| Bull. sten. CN - CE | Stenographic bulletin of the Federal Assembly (Bulletin officiel since 1962) |
| CC | Swiss Civil Code of 10 December 1907 (RS 210) |
| CDIP | Conference of Cantonal Directors of Education |
| CFE | Federal Commission on Foreigners |
| CFR | Federal Commission against Racism |
| CJCE | European Court of Justice |
| CN | National Council |
| CO | Federal Act of 30 March 1911 supplementing the Swiss Civil Code (fifth book: Law on Obligations) (RS 220) |
| CP | Swiss Criminal Code of 21 December 1937 (RS 311.0) |
| CPM | Military Criminal Code of 13 June 1927 (RS 321.0) |
| CPT | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |

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| CRA | Swiss Asylum Appeals Commission |
| CV | Vienna Convention on the Law of Treaties of 23 May 1969 (RS 0.111) |
| DDC | Swiss Agency for Development and Cooperation |
| DDPS | Federal Department of Defence, Civil Protection and Sports |
| DE | European Law |
| DFAE | Federal Department of Foreign Affairs |
| DFI | Federal Department of Home Affairs |
| DFJP | Federal Department of Justice and Police |
| ECHR | European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) |
| ECRI | European Commission against Racism and Intolerance |
| EGV | Treaty establishing the European Community of 25 March 1957 (see article G of the Treaty on the European Union of 7 February 1992) |
| EIMP | Federal Act concerning International Mutual Assistance in Criminal Matters of 20 March 1981 (RS 351.1) |
| EuGRZ | Europäische Grundrechte-Zeitschrift (since 1974) |
| First Covenant | International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (RS 0.103.1) |
| FF | Feuille fédérale |
| GG | Grundgesetz für die Bundesrepublik Deutschland, of 23 May 1949 (Bonn Constitution) (BGBl. S. 1, BGBl. III 100-1) |
| Ggh | Gesetzgebung heute, Mitteilungsblatt der Schweizerishcen Gesellschaft für Gesetzgebung (since 1990) |
| JAAC | Jurisprudence des autorités administratives de la Confédération (volume (year), number) |
| LACI | Federal Act concerning Compulsory Unemployment Insurance and Compensation in cases of Insolvency of 25 June 1982 (RS 837.0) |
| LAMal | Federal Act concerning Health Insurance of 18 March 1994 (RS 832.10) |

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| LAsi | Asylum Act of 26 June 1998 (RS 142.31) |
| LAVI | Federal Act concerning Assistance to Victims of Offences of 4 October 1991 (RS 312.5) |
| LAVS | Federal Act concerning Old Age and Survivors Insurance of 20 December 1946 (RS 831.10) |
| LDP | Federal Act concerning Political Rights of 17 December 1976 (RS 161.1) |
| LEg | Federal Act concerning Equality between Women and Men of 24 March 1995 (RS 151) |
| LF | Federal Act |
| LN | Federal Act concerning the Acquisition and Loss of Swiss Nationality of 29 September 1952 (RS 141.0) |
| LOGA | Federal Act concerning the Organization of Government and Administration of 21 October 1997 (RS 172.010) |
| LSEE | Federal Act concerning the Permanent and Temporary Residence of Foreigners of 26 March 1931 (RS 142.20) |
| LTr | Federal Act concerning Work in Industry, Crafts and Commerce of 13 March 1964 (RS 822.11) |
| NFC | New Federal Constitution of 18 April 1999 (RS 101) |
| NJW | Neue Juristische Wochenschrift (volume, (year), page) |
| NS | New series |
| NZZ | Neue Zürcher Zeitung |
| O | Ordinance |
| ODR | Federal Office for Refugees |
| OF | Federal Office |
| OFC | Old Federal Constitution of 29 May 1874 (RS 101) |
| OFE | Federal Aliens Office |
| OFS | Federal Office for Statistics (Annuaire statistique suisse) |

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| OJ | Federal Act concerning Judicial Organization of 16 December 1943 (RS 173.110) |
| OLE | Federal Council Ordinance of 6 October 1986 limiting the number of foreigners (RS 823.21) |
| PJA/AJP | Pratique juridique actuelle/Aktuelle Juristische Praxis |
| PPF | Federal Procedure Act of 15 June 1934 (RS 312.0) |
| RDS | Revue de droit suisse (since 1852); new series since 1882 (volume of the new series, (year), half-volume, page) |
| recht | recht, Zeitschrift für juristische Ausbildung und Praxis (since 1983) |
| RJB | Revue de la Société des juristes bernois |
| RO | Recueil officiel des lois fédérales (Official compendium of federal statutes) (cited by year or by volume, and page) |
| RS | Recueil systématique du droit fédéral (Systematic compendium of federal law) |
| SECO | State Secretariat for Economic Affairs |
| Second Covenant | International Covenant on Civil and Political Rights of 16 December 1966 (RS 0.103.2) |
| SJZ | Schweizerische Juristen-Zeitung (since 1904) |
| SSRSP | Swiss Society for Practical Social Research |
| StF | Civil Service Statutes |
| ZaöRV | Zeitschrift für ausländisches öffentliches Recht und Völkerrecht |
| ZBl | Schweizerisches Zentralblatt für Staats - und Verwaltungsrecht (since 1900) (until 1988: Schweizerisches Zentralblatt für Staats - une Gemeindeverwaltung) |
| ZBJV | Zeitschrift des bernischen Juristenvereins |
| ZRP | Zeitschrift für Rechtspolitik |

**List of annexes***

1. Federal Constitution of the Swiss Confederation of 18 April 1999 (RS 101).

2. Report of the Federal Council on Swiss human rights policy, of 16 February 2000 (Opinion relating to Bäumlin motion (CN 97.3621) "Report on consistency").

3. Federal Office for Statistics (ed.), La population étrangère en Suisse, 1998, Neuchâtel, 1999.

4. DDC, list of publications.

5. Federal Commission against Racism (ed.), TANGRAM, 1/96 ("The article on racial discrimination"); 3/97 ("Gypsies"); 7/99 ("Muslims in Switzerland").

6. Résumé of relevant cantonal judgements.

All other legal texts and documents cited or mentioned in the present report may be obtained from the Federal Office of Justice, International Affairs Division, 3003 Bern.

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* Annexes available for consultation in the Office of the High Commissioner for Human Rights.